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No. 129, Original

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

REPLY BY THE COMMONWEALTH OF VIRGINIA TO THE STATE OF MARYLAND'S EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

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QUESTIONS PRESENTED

1. Did the Special Master correctly find, pursuant to Article Seventh of the Compact of 1785 and Article Fourth of the Black-Jenkins Award of 1877, that Virginia, its political subdivisions and its citizens, do not need to obtain a Maryland permit as a condition of withdrawing water from the Potomac River or of building improvements appurtenant to the Virginia shore?

2. Did the Special Master correctly reject Maryland's argument that Virginia lost its interstate compact rights to withdraw water from the River and to build improvements appurtenant to the shore — without first having to obtain Maryland's permission — considering that: (a) no State has ever lost a federally-approved interstate compact right based on the doctrine of prescription and acquiescence; (b) Virginia state officials did not learn until 1973 that Maryland claimed that its Potomac River permitting requirements applied to Virginia; (c) Virginia, from 1976 through 1979, clearly disputed Maryland's authority; (d) the period of alleged acquiescence is significantly shorter than in any previous case in which prescription has been found; and (e) Virginia filed suit here after the very first instance in which Maryland used its permitting requirements to block a Virginian's access to the River?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Cited Authorities vi

Table of Abbreviations xviii

Statement of the Case 1

A. The Colonial Charters and Interstate Compacts 1

B. The Present Controversy 9

C. The Special Master's Recommendations and Maryland's Exceptions 13

Argument 13

I. The Special Master Correctly Found That Virginia's Compact Rights Entitle It To Withdraw Water From The Potomac River And To Build Improvements Appurtenant To The Virginia Shore Without Obtaining Maryland's Prior Permission 13

A. The 1785 Compact and the 1877 Award Confirmed Virginia's Right to Use the Potomac River and to Build Improvements Appurtenant to the Virginia Shore Without Maryland's Permission 14

Contents

Page

B. Maryland Incorrectly Claims that Its Ownership of the Potomac River Was "Well-Settled" in 1785 19

C. Maryland Law Cannot Determine Virginia's Rights in the Potomac River 21

1. Federal Common Law, Not Maryland Law, Would Govern Virginia's Rights in the Absence of a Compact 21

2. The "Unmistakability Doctrine" is Inapplicable 22

D. Maryland's Claimed Regulatory Authority Cannot be Reconciled with Virginia's Rights of Access 26

II. The Special Master Correctly Rejected Maryland's Affirmative Defense Of Prescription And Acquiescence 28

A. A State Cannot Lose a Compact Right by Prescription and Acquiescence 28

B. Even if Applicable, the Doctrine Should Require Proof by Clear and Convincing Evidence 29

C. Maryland's Evidence is Inadequate Even Under a "Preponderance of the Evidence" Standard 30

Contents

Page

1. The Only Relevant Evidence Concerns Water Withdrawal and Waterway Construction 30

2. Virginia Taxes More Than 99% of the Structures Extending Beyond the Boundary 30

3. Maryland Failed to Prove Virginia's Knowledge of Maryland's Permitting System Prior to 1973 31

4. Any Prescriptive Period Was Interrupted in 1976, When Virginia Protested Maryland's Claim 36

5. The Period from 1979 Through 1997 is Inadequate 43

   (a) The Period is Too Short 43

   (b) Virginia Took Action Promptly After Maryland Denied It Access to the River for the First Time in 1997 45

   (c) The Absence of Virginia Permitting Is Irrelevant 46

   (d) Maryland's 1987 Tidal Wetlands Policy and the VMRC Staff Correspondence Do Not Prove Acquiescence 47

Contents

Page

D. A Court of Equity Would Not Give Maryland Control Over Virginia's Potomac River Access Rights 48

III. ANS' Arguments Are Without Merit 49

Conclusion 50

TABLE OF CITED AUTHORITIES

Page

CASES

Arizona v. California, 373 U.S. 546 (1963) 44, 45

Arkansas v. Tennessee, 310 U.S. 563 (1940) 43

BankAmerica Corp. v. United States, 462 U.S. 122 (1983) 19

Barnes v. Maryland, 47 A.2d 50 (Md. 1946) 20

Board of Supervisors v. Countryside Investment Co., 522 S.E.2d 610 (Va. 1999) 35

Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986) 22

California v. Nevada, 447 U.S. 125 (1980) 43

California ex rel. State Lands Comm'n v. United States, 457 U.S. 273 (1982) 35

Central R.R. Co. of New Jersey v. Mayor of New Jersey, 209 U.S. 473 (1908) 24, 25

Colorado v. New Mexico, 459 U.S. 176 (1982) 22, 50

Colorado v. New Mexico, 467 U.S. 310 (1984) 22

County Bd. v. Brown, 329 S.E.2d 468 (Va. 1985) 35

County of Fairfax v. Southern Iron Works, Inc., 410 S.E.2d 674 (Va. 1991) 48

Cited Authorities

	Page
Cuyler v. Adams, 449 U.S. 433 (1981)	28
EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991)	19
Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000)	50
Georgia v. South Carolina, 497 U.S. 376 (1990)	43
Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823)	25
Handly's Lessee v. Anthony, 18 U.S. (5 Wheat.) 374 (1820)	6
Henderson Bridge Co. v. City of Henderson, 173 U.S. 592 (1899)	6
Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938)	21, 22
Idaho ex rel. Evans v. Oregon, 462 U.S. 1017 (1983)	22
Illinois v. City of Milwaukee, 406 U.S. 91 (1972)	21
Illinois v. Kentucky, 500 U.S. 380 (1991)	29, 30, 31
Illinois v. Milwaukee, 731 F.2d 403 (7th Cir. 1984)	22
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Indiana v. Kentucky, 136 U.S. 479 (1890)	6, 43, 44

Cited Authorities

Page

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 22

Kansas v. Colorado, 206 U.S. 46 (1907) 21, 50

Kansas v. Colorado, 533 U.S. 1 (2001) 14, 25

Kentucky v. Indiana, 281 U.S. 163 (1930) 35

Louisiana v. Mississippi, 202 U.S. 1 (1906) 43

Marine Ry. & Coal Co. v. United States, 257 U.S. 47 (1921) 3, 4, 20, 32

Maryland v. West Virginia, 217 U.S. 1 (1910) 1, 2, 5, 6, 20, 43

Maryland v. West Virginia, 217 U.S. 577 (1910) 19

Massachusetts v. New York, 271 U.S. 65 (1926) 24

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 48

Michigan v. Wisconsin, 270 U.S. 395 (1926) 43

Montana v. United States, 450 U.S. 544 (1981) 23

Morris v. United States, 174 U.S. 196 (1899) 1, 2, 20

Mugler v. Kansas, 123 U.S. 623 (1887) 25

Nebraska v. Wyoming, 507 U.S. 584 (1993) 44

New Jersey v. Delaware, 291 U.S. 361 (1934) 43

New Jersey v. New York, 283 U.S. 336 (1931) 21, 22

Cited Authorities

Page

New Jersey v. New York, 345 U.S. 369 (1953) 35

New Jersey v. New York, 523 U.S. 767 (1998) 14, 28, 29, 31, 34, 39, 43, 47, 49

New Orleans Gas-Light Co. v. Louisiana Light & Heat Prod. & Mfg. Co., 115 U.S. 650 (1885) 25

New York v. New Jersey, 256 U.S. 296 (1921) 45

Ohio v. Kentucky, 410 U.S. 641 (1973) 28, 43, 48

Ohio v. Kentucky, 444 U.S. 335 (1980) 6, 24

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) 27

Oklahoma v. New Mexico, 501 U.S. 221 (1991) 14

Oklahoma v. Texas, 272 U.S. 21 (1926) 39

Pizzarelle v. Dempsey, 526 S.E.2d 260 (Va. 2000) 29

Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838) 5

Rhode Island v. Massachusetts, 45 U.S. (4 How.) 591 (1846) 43

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Cited Authorities

Page

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United States v. Bekins, 304 U.S. 27 (1938) 25

United States v. California, 332 U.S. 19 (1947) 35

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United States v. City & County of San Francisco, 310 U.S. 16 (1940) 45

United States v. Stone, 69 U.S. 525 (1865) 44

United States v. Wheeler, 435 U.S. 313 (1978) 44

United States v. Winstar Corp., 518 U.S. 839 (1996) 13, 22-23, 25

Utah Power & Light Co. v. United States, 243 U.S. 389 (1917) 35

Vermont v. New Hampshire, 289 U.S. 593 (1933) 20, 43

Vermont v. New York, 417 U.S. 270 (1974) 21

Virginia v. Maryland, 355 U.S. 269 (1957) 8

Virginia v. Maryland, 530 U.S. 1201 (2000) 11

Virginia v. Tennessee, 148 U.S. 503 (1893) 43

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Page

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Wharton v. Wise, 153 U.S. 155 (1894) 8, 20, 28

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Page

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2 Va. Code Ann. ch. 237 (1819) 16

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Va. Code Ann. §§ 36-97 to 36-119.1 (Michie 1996 & Supp. 2002) 46

Va. Code Ann. § 62.1-44.3 (Michie 2001) 46

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Va. Code Ann. § 62.1-44.116 (Michie 2001) 42

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18 Va. Regs. Reg. 3601-03 (Aug. 26, 2002) 46

1785-86 Md. Laws ch. 1 4

1785 Va. Acts ch. 17 4

1798 Va. Acts ch. 60, 2 Va. Stat. 122 (1835) 16

Cited Authorities

Page

1874 Md. Acts ch. 247 ..... 7, 18

1874 Va. Acts ch. 135 ..... 7, 18

1876 Va. Acts ch. 48 7

1876 Md. Laws ch. 198 7

1878 Md. Laws ch. 274 8

1933 Md. Laws ch. 526 32

1973 Md. Laws ch. 4 32

1989 Va. Acts ch. 720, *codified at* Va. Code Ann. § 62.1-44.15:5 (Michie 2001) 46

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District of Columbia Water Supply, Hearing before the Subcomm. on Gov'l Efficiency & the District of Columbia of the Senate Comm. on Gov'l Affairs, 96th Cong., 1st Sess. (Oct. 10, 1979) 43

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Cited Authorities

Page

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Page

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Cited Authorities

Page

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TABLE OF ABBREVIATIONS

Abbreviation	Description
L-#	Lodging Accompanying Reply by the Commonwealth of Virginia (Mar. 31, 2003)
Md. App.	Appendix to the Exceptions of the State of Maryland to the Report of the Special Master (Feb. 27, 2003)
Md. Br. Opp. LTF	Maryland's Brief in Opposition to Motion for Leave to File Bill of Complaint (Apr. 24, 2000)
Md. Exc.	Exceptions of the State of Maryland to the Report of the Special Master (Feb. 27, 2003)
Md. Moot. Mot.	Defendant's Motion to Dismiss on the Basis of Mootness (May 25, 2001)
Md. Moot. Reply Br.	Maryland's Reply to Virginia's Opposition to Defendant's Motion to Dismiss on the Basis of Mootness (June 13, 2001)
Mem. Dec. No. 1	Special Master's Memorandum of Decision No. 1 (Subject: *Amicus Curiae* Motions) (Dec. 11, 2000)
Mem. Dec. No. 2	Special Master's Memorandum of Decision No. 2 (Subject: ANS Motion for Reconsideration of the Denial of its Motion to Dismiss for Lack of Subject Matter Jurisdiction) (Dec. 28, 2000)

MX #	The exhibit number assigned to Maryland's evidentiary materials as identified in the Report of the Special Master. *See* S.M. App. G-2.
PMX #	The exhibit number Maryland originally (previously) assigned to evidentiary materials it submitted to the Special Master.
PVX #	The exhibit number Virginia originally (previously) assigned to evidentiary materials it submitted to the Special Master.
Report	Report of the Special Master (Dec. 9, 2002)
S.M. App.	Report of the Special Master Appendices (Dec. 9, 2002)
Tr. (4/24/02)	Transcript of Oral Argument before the Special Master, Defendant's Motion for Summary Judgment (Apr. 24, 2002)
VX #	The exhibit number assigned to Virginia's evidentiary materials as identified in the Report of the Special Master. *See* S.M. App. G-1.

This case is about Virginia's rights to withdraw water from the Potomac River and to construct improvements appurtenant to the Virginia shore without first having to obtain Maryland's permission. These rights, implicit in federal common law, were expressly secured by Article Seventh of the Compact of 1785 and Article Fourth of the Black-Jenkins Award of 1877, and preserved in Article VII, § 1, of the Potomac River Compact of 1958, and in the Potomac River Low Flow Allocation Agreement of 1978. The Special Master correctly concluded that Maryland's permitting system, as applied to Virginia, violates Virginia's rights.

STATEMENT OF THE CASE

A. The Colonial Charters and Interstate Compacts.

Contrary to Maryland's claim that its ownership of the Potomac River has been well settled at all times since 1632, control of the Potomac has been disputed for centuries. The original territories of Virginia and Maryland were the subject of inconsistent and conflicting royal charters and patents. *See Maryland v. West Virginia*, 217 U.S. 1, 24-29 (1910); *Morris v. United States*, 174 U.S. 196, 223 (1899). Virginia's territorial claims derived from three charters, issued to the London Company by King James I in 1606, 1609 and 1612, *see* 1 Hening's Statutes at Large 57-110 (1823); and a patent issued in 1649 by King Charles II to Lord Hopton and others for what became known as Virginia's "Northern Neck," confirmed by a later patent issued in 1688 by King James II to Thomas Lord Culpeper. *Morris*, 174 U.S. at 223. The 1609 Charter extended Virginia's territory from Point Comfort (located at the mouth of the James River) to 200 miles north and south, and from sea to sea, thereby including all of what is now the State of Maryland. Second Charter, Art. 6 (May 23, 1609), *reprinted in* 1 Hening's Statutes at Large 80, 88 (1823). The patent for the Northern Neck was bounded by the Potomac and Rappahanock Rivers. It specifically included "the said rivers themselves and all the islands within the outermost banks thereof. . . ." *Morris*, 174 U.S. at 223. Under both the 1609 Charter and the later patents for the Northern Neck, the entire Potomac River was in Virginia.

Maryland based its territorial claims on the Charter of 1632 from King Charles I to Lord Baltimore. The Charter was written in Latin and the original document has been lost. (S.M. App. D-2.)[1] Under the translation accepted by the Court in 1910 in *Maryland v. West Virginia*, the grant described the territory as running west from the Delaware Bay along the 40° parallel, to the "true meridian of the first fountain of the river Potomac, then tending downward towards the south to the farther bank of the said river" (*ad ulteriorem dicti Fluminis Ripam*), "and following it to where it faces the western and southern coasts . . . near the mouth of the same river, where it discharges itself in the aforenamed bay of Chesapeake. . . ." 217 U.S. at 25. Virginia disputed whether this description actually included the Potomac River.

Although Virginia's Constitution of 1776 relinquished its claims to territories contained in the charters of neighboring colonies, including Maryland, it specifically reserved "the free navigation and use of the rivers Potowmack and Pokomoke, with the property of the Virginia shores or strands bordering on either of the said rivers, and all improvements which have been or shall be made thereon." Va. Const., Art. XXI (1776), *reprinted in* 1 Hening's Statutes at Large 50, 56 (1823). Delegates to Maryland's constitutional convention rejected this reservation, however, asserting that "the sole and exclusive jurisdiction over the . . . river Potowmack . . . belongs to this state." (Report at 4.)

The dispute over control of the Potomac River went unresolved. For example, in October 1776, just four months after Virginia adopted its Constitution, the sheriff of Fairfax County arrested a Maryland citizen who was operating a ferry in competition with a Virginia ferry established on George Mason's property. (L-133.) The Marylanders complained to Thomas Johnson, a delegate to Maryland's constitutional convention of 1776, that the Potomac River was "being wholy [sic] claimed by the State of Virg[inia]." (*Id.*)

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1. A Table of Abbreviations used for citations to materials in the record appears at xviii.

The Virginia and Maryland legislatures appointed commissioners in December 1777 to settle the States' jurisdiction over the Potomac and Pocomoke Rivers and the Chesapeake Bay, but the commissioners never met. (*See* Report at 5.) After the War of Independence, Virginia again appointed commissioners, in June 1784, citing the "great inconveniences" resulting from the "want of some concerted regulations, between this State and the State of Maryland, touching the jurisdiction and navigation of the River Patomac." *Journal of the House of Delegates of the Commonwealth of Virginia*, May Session, 1784, at 84 (White ed. 1828) (MX 16/PMX Opp. 40). Maryland reappointed its commissioners in January 1785 "to adjust and settle the jurisdiction to be exercised by the said states respectively" over the Potomac and Pocomoke Rivers and the portion of the Chesapeake Bay in Virginia. *Votes and Proceedings of the House of Delegates of the State of Maryland*, November Session, 1784, at 113 (MX 23/PMX Opp. 59). This occurred during the same period in which the States were jointly chartering the Potomac Company for the purpose of improving the navigation of the Potomac River as far west as practicable. (*See* L-647 to L-662; L-686 to L-687 (chronology).)

The commissioners met at Mount Vernon in March and negotiated the Compact of 1785. *See* 2 *Papers of George Mason* 812-28, 835-38 (Robert A. Rutland, ed., 1970). (*See also* L-658 to L-661.) The Compact's stated purpose was "to regulate and settle the jurisdiction and navigation of" the Potomac and Pocomoke rivers, and that part of Chesapeake bay "which lieth within the territory of Virginia. . . ." (S.M. App. B-1 (Preamble).) Consistent with the States' recent chartering of the Potomac Company, and "with a view to opening up a route to the West," *Marine Ry. & Coal Co. v. United States*, 257 U.S. 47, 64 (1921), Article Sixth recognized the Potomac River "as a common highway for the purpose of navigation and commerce to the citizens of Virginia and Maryland, and of the United States. . . ." (S.M. App. B-3.) Article Eighth required concurrent legislation to enact laws "necessary for the preservation of fish" and for "preserving and keeping open the channel and navigation" of the River. (*Id.*) Article Seventh, at issue in this case, guaranteed to the "citizens of each state respectively . . .

full property in the shores of Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river . . . ." (*Id.*) It also provided that "the right of fishing in the river shall be common to, and equally enjoyed by, the citizens of both states." (*Id.*) The Compact was duly ratified and each State pledged never to repeal it without the other's consent. 1785-86 Md. Laws ch. 1 (S.M. App. B-7 to B-8); 1785 Va. Acts ch. 17.

As a result of the Compact of 1785, Virginia and Maryland enjoyed a lengthy period of cooperation in matters concerning the Potomac River. They enacted various concurrent legislation regulating fishing in the River. *See generally* Carl N. Everstine, *Research Report No. 26: The Compact of 1785* at 5-6 (1946) (surveying concurrent legislation) (VX 70/PVX 73). They also jointly oversaw the operations of the Potomac Company and its successor, the Chesapeake and Ohio Canal Company, enacting concurrent legislation relating to both. (*See* L-676.) Thomas Jefferson described the Potomac River as "common to Virginia and Maryland. . . ." *Notes on the State of Virginia* 1 (2d Am. ed. 1794) (VX 227/PVX 338). In 1787, James Madison cited the Potomac River as proof that "[a] concurrent jurisdiction is both practicable and equitable," reflecting the "equal & reciprocal rights of the owners of opposite shores, over the stream itself." 9 *Papers of James Madison* 230-31 (Robert A. Rutland, ed., 1975) (VX 248/PVX 111).[2] In 1804, John Mason, a director of the Potomac Company, described the River as "a common highway belonging equally to Virginia and Maryland, and the common boundary between them." (VX 131/PVX 88.)

Despite the two States' harmonious use of the Potomac River, the Compact had "left the question of boundary open to long continued disputes." *Marine Ry.*, 257 U.S. at 63-64. That uncertainty was reflected in the first official map of the

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2. Maryland's selective quotation from an earlier letter by Madison to Jefferson in March 1784 (Md. Exc. at 21), is taken out of context. (*See* L-692 to L-700.)

State of Maryland, prepared by Dennis Griffith in 1794 and funded partially by the Maryland General Assembly. Rendered more than 150 years after the 1632 Charter from Charles I to Lord Baltimore, the map plainly showed the boundary line running down the middle of the entire River. (Report at 50-51 & n.68.)[3]

For nearly 100 years following the Compact of 1785, the States unsuccessfully attempted to fix their mutual boundary. Those efforts were chronicled in *Maryland v. West Virginia*, 217 U.S. at 31-37. *See also Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 724 (1838) ("Maryland and Virginia were contending about boundaries in 1835 . . . and the dispute is yet an open one."). In 1861, a Virginia commissioner reported to the Virginia Governor that if the original 1632 Charter to Lord Baltimore had not been lost and the surviving copies mistranslated, "no reasonable doubt would ever have existed that the whole Potomac river, from its source, wherever fixed, and whenever ascertained, to its mouth, was wholly without the limits of Maryland, and within the bounds of Virginia." *Report of Col. A.W. McDonald to Gov. Letcher* (Mar. 1861), *reprinted in Virginia's Claim to the Potomac River*, 9 Hist. Mag. & Notes & Queries 13, 15 (1865) (VX 239/PVX 96).

The most serious efforts to resolve the controversy occurred when commissioners from both States met in 1872 and 1873. The Maryland Commissioners believed that the boundary should be drawn at the low-water mark on the Virginia shore, while recognizing Virginia's right to build wharves and improvements from the shoreline in accordance with the Compact of 1785. *See* Commission on Boundary Lines Between Virginia and Maryland (1870-1874), *Report and Journal of Proceedings of the Joint Commissioners to Adjust the Boundary Line of the States of Maryland and Virginia, Authorized by the Act of 1872, chapter 210* at 42, 53, 140 (Annapolis 1874) (L-22, L-27, L-70) [hereinafter "Maryland Boundary Commissioners' Report"]. The Virginia Commissioners, on the other hand,

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3. A digital image of the map can be viewed at the Library of Congress website: http://hdl.loc.gov/loc.gmd/g3840.ct000307 (last visited Mar. 21, 2003).

insisted on a boundary on the Maryland side of the River. *Id.* at 54, 310, 312, 329 (L-28, L-111, L-112, L-120). They argued that Virginia owned the entire River because it was part of the territory conveyed under the 1609 Charter from King James I. *Id.* at 237-38 (L-74 to L-75). They rejected Maryland's claim that the Virginia Charters had been rendered invalid in a *quo warranto* proceeding against the London Company in 1624, arguing that the revocation of the Company's powers did not affect the territorial rights of the colony. *Id.* at 240-42 (L-76 to L-77). The United States, they pointed out, had recognized Virginia's territorial rights under the 1609 Charter when it accepted Virginia's cession of the Northwest Territory. *Id.* at 241, 243 (L-76, L-77).[4]

Furthermore, the Virginia Commissioners specifically disputed Maryland's claim that the 1632 Charter to Lord Baltimore included the entire Potomac River. They pointed out that the River actually flows in a *northwesterly* direction from its "first fountain" before circling back to flow generally in a southeasterly direction. *Id.* at 257-58 (L-84 to L-85).[5] Thus, "the ulterior bank of the river was geographically the *left* bank thereof. The line thus mathematically was fixed on the *north* side of the Potomac." *Id.* at 258 (second emphasis added) (L-85). The patent for the Northern Neck simply confirmed that Virginia's territory included the entire Potomac River. *Id.* at 254-55, 258 (L-83, L-85).

The Virginians further buttressed their argument by reference to a map prepared by the Geographer to the King according to the Treaty of Paris of 1763. That map clearly showed the boundary line on the *Maryland* side of the River. *Id.* at 304-05 (L-108).[6] It recited: "The Limits of His Majesty's

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4. The territorial rights of Kentucky, Illinois, Indiana and Ohio were all premised on the validity of Virginia's original grants from King James I. *See Ohio v. Kentucky*, 444 U.S. 335, 338 (1980); *Henderson Bridge Co. v. City of Henderson*, 173 U.S. 592, 609-10 (1899); *Indiana v. Kentucky*, 136 U.S. 479, 508 (1890); *Handly's Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374, 376 (1820).

5. *See* Plate No. 1, *Maryland v. West Virginia*, 217 U.S. 1, 26 (1910).

6. *See* Emanuel Bowen, *An Accurate map of North America. Describing and distinguishing the British and Spanish dominions of this great continent;* (Cont'd)

several Provinces are here laid down *as they at present exercise their* jurisdictions." *Id.* at 305 (L-108). The map identified a number of colonial boundaries that "are not yet finally determined," but the boundary between Virginia and Maryland was not among them. *Id.* Thus, Virginia's Constitution of 1776 did not cede the Potomac River to Maryland as part of the territory covered by the 1632 Charter because that Charter did *not* include the Potomac River, and because the Virginia Constitution specifically stated that Virginia's western and northern extent " 'shall *in all other respects stand as fixed by the charter of King James the 1st, in the year 1609, and by the public treaty of peace between the Courts of Great Britain and France in the year 1763. . . .*' " *Id.* at 309 (*quoting* Va. Const., Art. XXI (1776) (alteration in original)) (L-110).

In 1874, Virginia and Maryland submitted the boundary dispute to arbitration. The enabling legislation specifically reserved to each State and its citizens the rights set forth in the Compact of 1785. *See* 1874 Va. Acts ch. 135, § 1 (L-169); 1874 Md. Laws ch. 247, § 1 (L-171). A later enabling Act further protected the property rights of any citizens affected by the boundary award. *See* 1876 Md. Laws ch. 198, § 1 (L-173); 1876 Va. Acts ch. 48, § 1 (L-175).

On January 16, 1877, the arbitrators issued their award (S.M. App. C), together with a lengthy opinion (*id.* D). Jeremiah S. Black and Charles J. Jenkins fixed the boundary at the low-water mark on the Virginia side of the River, running from headland to headland. (*Id.* C-1 to C-4, D-17 to D-19.) James B. Beck agreed with that conclusion but dissented as to the location of the boundary line across the Chesapeake Bay and the Eastern Shore. (*Id.* D-33.) The arbitrators interpreted the 1632 Charter to Lord Baltimore as specifying the "south bank" of the River as the boundary, not the Maryland side. (*Id.* D-8.) While the original charter would have called for a boundary at the high-water mark (*id.* D-9), the arbitrators found that

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(Cont'd)

according to the definitive treaty concluded at Paris 10th Feby. 1763. A digital image may be viewed at: http://hdl.loc.gov/loc.gmd/g3300.ar002300 (last visited March 21, 2003).

"this is not the present boundary." (*Id.* D-17.) Virginia had acquired title to the low-water mark, as well as the right to use the River beyond the low-water mark, through a long period of prescription dating to "the earliest period of her history. . . ." (*Id.* D-18.) That use was specifically protected by Virginia's Constitution of 1776 and by the Compact of 1785, to which Maryland had assented. (*Id.*) Article Fourth of the Award thus provided that:

> Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has *a right to such use of the river beyond the line of low-water mark* as may be necessary to the *full enjoyment* of her riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, *agreeably to the compact of seventeen hundred and eighty-five*. (*Id.* C-4 to C-5 (emphasis added).)

Both States ratified the Award. 1878 Md. Laws ch. 274 (L-176), 1878 Va. Acts ch. 246. Congress gave its consent in 1879. Act of March 3, 1879, ch. 196, 20 Stat. 481. In *Wharton v. Wise*, 153 U.S. 155 (1894), the Court held that the ratification of the Award by Congress, "taken in connection with the conditions upon which the award was authorized, operated as an approval of the *original compact*, and of its continuance in force under the sanction of Congress." *Id.* at 173 (emphasis added).

For eighty years following the Black-Jenkins Award, the two States enjoyed cooperative relations and passed various concurrent laws respecting the River. Everstine, *supra*, at 6. (*See also* Report at 66-67.) That peace was broken in 1957, when Maryland attempted to assume unilateral authority over fishing and oyster regulation in the tidal Potomac and to abrogate the Compact of 1785 entirely. Virginia was granted leave to file suit against Maryland in this Court, 355 U.S. 269 (1957), but the parties resolved their dispute by the Potomac River Compact of 1958. (*See* Report at 67-68.) The 1958 Compact created the Potomac River Fisheries Commission – comprised equally of representatives from both States – to regulate fishing in the tidal Potomac. (*Id.*; S.M. App. E-11 to E-23.)

The 1958 Compact superseded the Compact of 1785, but Article VII, § 1 of the new compact specifically preserved the rights set forth in Article Seventh of the original Compact. (Report at 67-68.) The language of Article Seventh of the 1785 Compact thus "remains in effect today. . . ." (*Id.* at 44.)

B. The Present Controversy.

During the previous hundreds of years in which ownership and control of the Potomac River was disputed, Maryland had never prevented any Virginian from withdrawing water from the River or building improvements appurtenant to the Virginia shore. Maryland broke that pattern in 1997 when it attempted to block the Fairfax County Water Authority (the "FCWA") from building a new drinking water intake intended to serve 1.2 million people in Northern Virginia.

Maryland currently requires a permit from any person seeking to withdraw water from the Potomac River or to build an improvement appurtenant to the shore. Md. Code Ann., Envir. §§ 5-502 to 5-504 (1996 & Supp. 2002). Virginia state officials became aware in 1973 that Maryland was applying its permitting system to Virginians using the River. Beginning in 1976, Virginia protested Maryland's authority to do so. *See* Part II(C)(3)-(4), *infra*, at 31-43. Until 1997, however, Maryland had never actually used its permitting system to deny any Virginian access to the River. (Answer ¶ 34; Md. Moot. Mot. at 8; Md. Moot. Reply Br. at 12.)

The FCWA is a local governmental subdivision of the Commonwealth of Virginia. It operates an intake on the Virginia shore of the Potomac River that began withdrawing water in 1982. (VX 197/PVX 248 at 19.) The FCWA obtained a water appropriation permit from Maryland for its shoreline intake in 1974 (MX 843/PMX X, ¶ 20 & MX 862/PMX X-19), and a waterway construction permit in 1977 (MX 1006/PMX Y, ¶ 8 & MX 1012/PMX Y-6). The FCWA received amended water appropriation permits from Maryland in 1982, 1987, 1990 and 1995, each time increasing its permitted withdrawals by 50 million gallons a day. (MX 843/PMX X, ¶¶ 24, 27, 32, 37.) The Potomac River today accounts for approximately half of the FCWA's raw water supply. (VX 197/PVX 248 at 17.)

In 1996, to improve operational efficiency and raw water quality, the FCWA sought to build an offshore water intake extending 725-feet into the channel of the Potomac, at a point where the River is 2000 feet wide. (VX 197/PVX 248 at 16.) A comprehensive history of the project and the permit dispute, covering the period 1996 through 2001, was presented to the Special Master. (L-511 to L-539.) Beginning in May 1997, numerous Maryland state legislators sought to block the project. (*E.g.*, L-341 to L-344; L-367 to L-373; L-515 to L-518; VX 182/PVX 213.) Maryland Senator Jean Roesser, calling a "spade a spade," claimed the project would only "accommodate[] Virginia's massive growth." (L-343.) Maryland Delegate Jean Cryor, in particular, urged Governor Parris N. Glendening and the Maryland Department of Environment ("MDE") to oppose the project, claiming that "Virginia's planners regard the Potomac River as key to their burgeoning development." (VX 182/PVX 213; L-367.) While granting the permit might be "neighborly," Maryland Delegate Adrienne A. Mandel said, it would only harm Maryland's interests by causing more development in Northern Virginia. (L-368.)

On December 10, 1997, MDE formally refused to issue a construction permit, stating that the FCWA's "need" for water "may reasonably be accomplished using the existing intake on the Virginia shore of the Potomac River." (VX 191/PVX 224.) In February 1998, Governor Glendening said that he had decided that the project was not in the "public interest." (L-384.) During her successful 1998 reelection campaign, Delegate Cryor claimed credit for having stopped the project. (L-347, L-382.)

The FCWA appealed MDE's decision on December 23, 1997. (VX 197/PVX 248 at 1.) Although the FCWA repeatedly argued that it was entitled to construct the offshore intake based on the Compact of 1785 and the Black-Jenkins Award of 1877, neither the Maryland Administrative Law Judge (the "ALJ") nor MDE ever addressed its argument. (*See* L-330 to L-331; VX 197/PVX 248 at 88; VX 318/PVX 253 at 21 n.6.) Three years of administrative proceedings and hearings followed,

during which Maryland stipulated that the intake would be safely submerged, that it would have no adverse aesthetic impact, and that it would not harm Potomac River fisheries or interfere with boating. (VX 197/PVX 248 at 15-16.) The ALJ found in January 1999 that MDE had failed to prove that the project would have any adverse environmental impact. (VX 325/PVX 242.) Nonetheless, MDE ruled in June 1999 that it had the power to deny the permit anyway if it determined that the project was not "needed" by the FCWA. (VX 312/PVX 243 at 13, 19.)

In November 1999, Virginia's Attorney General wrote to his Maryland counterpart protesting Maryland's treatment of the FCWA as a violation of Virginia's interstate compact rights – particularly Maryland's requirement that Virginia prove the "necessity" of the project to Maryland's satisfaction. (L-403.) Virginia called upon Maryland either to issue the permit promptly or to acknowledge formally that no permit was required. (*Id.*) The Maryland Attorney General insisted that the permit proceedings had to run their course. (L-405.) Following the introduction of legislation in the Maryland General Assembly to restrict the construction of new intakes in the River, Virginia sought leave to institute this action on February 18, 2000. The Court granted Virginia's motion on March 30, 2000. 530 U.S. 1201 (2000).

On May 10, 2000, the Maryland ALJ issued an opinion finding that MDE had "presented virtually no credible evidence" to support its opposition to the FCWA's project, that ample evidence supported the need for the project, and that MDE's permit denial was "inappropriate." (*See* VX 197/PVX 248 at 45-46.) When the "Final Decision Maker" for MDE adopted the ALJ's recommendations in November 2000 (VX 318/PVX 253), Maryland's Governor vowed to fight on, claiming in a press release that the project would cause "irreparable environmental damage by encouraging [urban] sprawl. . . ." (L-360; *see also* VX 285/PVX 134 ¶ 2.) MDE thereupon appealed its *own* Final Decision Maker's decision to issue the permit. (VX 319/PVX 254.) The Circuit Court for the City of Baltimore dismissed Maryland's appeal

in April 2001, finding that MDE not only lacked standing to challenge its own ruling, but that substantial evidence supported the FCWA's need for the project. (VX 267/PVX 257.)

The construction permit that Maryland finally issued to the FCWA contained "special conditions" mandated by the Maryland General Assembly while this case was pending. (*See* L-526 to L-532; L-536 to L-537; VX 318/PVX 253 at 19-20; L-337 (Sp. Cond. 1(e)).) Two versions of the "Potomac River Protection Act" had passed – one sponsored by Delegate Cryor that would have prohibited an intake pipe of the size desired by the FCWA, the other by Senator Christopher Van Hollen that allowed the FCWA to build the pipe to the desired size, but only if it included a permanent flow-restrictor limiting the quantity of water to the amount authorized under the FCWA's water appropriation permit. (L-529 to L-530.) Senator Van Hollen had loosened the restrictions in his original bill in response to Virginia's suit against Maryland:

> The primary purpose of the amendment, [Van Hollen] said, is to strengthen the hand of Maryland environmental officials in negotiations with Virginia. The original bill would have prevented the state from granting Virginia's permit and settling the lawsuit before it reaches the U.S. Supreme Court. "I don't think Maryland wants to roll the dice on control over the Potomac River. . . ."

(L-356.) Delegate Cryor and the Secretary of the MDE agreed with Senator Van Hollen that Governor Glendening should sign his bill instead of Cryor's version, so as not to jeopardize Maryland's litigation position here. (*See* L-413.) Nonetheless, Van Hollen explained the importance of the required flow-restrictor: "We don't want Virginia to willy-nilly withdraw large amounts out of the Potomac to fuel development on its side. . . . We'd have the key to physically adjust it." (L-360 to L-361.)

C. The Special Master's Recommendations and Maryland's Exceptions.

The parties litigated four major issues before the Special Master. First, the Special Master rejected Maryland's argument that the case became moot once Maryland declined any further appeals of the decision to issue the permit to the FCWA. (S.M. App. F-3 to F-9.) Second, the Special Master found that the rights conferred in Article Seventh of the Compact of 1785 apply to the entire Potomac River, including the non-tidal portion where the FCWA's offshore intake is located (the "Entire River Issue"). (Report at 14, 72-73.) Third, the Special Master rejected Maryland's argument that it should have implied police power authority to regulate Virginia's access to the Potomac, even if such authority is not found in Article Seventh of the Compact of 1785 or Article Fourth of the Black-Jenkins Award (the "Regulation Issue"). (Report at 73.) Finally, the Special Master found that Maryland had failed to prove that Virginia lost its right of unrestricted access to the Potomac by having acquiesced in Maryland's prior issuance of permits to Virginia users (the "Acquiescence Issue"). (Report at 77-96.)

Maryland takes exception only to the last two of the Special Master's conclusions.

ARGUMENT

I. THE SPECIAL MASTER CORRECTLY FOUND THAT VIRGINIA'S COMPACT RIGHTS ENTITLE IT TO WITHDRAW WATER FROM THE POTOMAC RIVER AND TO BUILD IMPROVEMENTS APPURTENANT TO THE VIRGINIA SHORE WITHOUT OBTAINING MARYLAND'S PRIOR PERMISSION.

Maryland's first exception rests on three premises: (1) neither the Compact of 1785 nor the Black-Jenkins Award of 1877 denied Maryland the authority to regulate the terms of Virginia's access to the Potomac River; (2) Maryland was the undisputed owner of the entire Potomac River in 1785; and (3) applying the "unmistakability doctrine," *United States v. Winstar Corp.*, 518 U.S. 839, 871 (1996), Maryland impliedly retains the authority to regulate Virginia's Potomac River

access rights, even if that authority is not expressly found in the Compact or the Award. Each step in Maryland's argument is wrong.

A. The 1785 Compact and the 1877 Award Confirmed Virginia's Right to Use the Potomac River and to Build Improvements Appurtenant to the Virginia Shore Without Maryland's Permission.

"A compact is a contract. It represents a bargained-for exchange between its signatories and 'remains a legal document that must be construed and applied in accordance with its terms.'" *Kansas v. Colorado*, 533 U.S. 1, 20 (2001) (O'Connor, J., concurring in part and dissenting in part) (*quoting Texas v. New Mexico*, 482 U.S. 124, 128 (1987)). A congressionally approved compact is also "a statute." *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991). "Just as if a court were addressing a federal statute, then, the '*first and last order of business*' of a court addressing an approved interstate compact 'is interpreting the compact.'" *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (*quoting Texas v. New Mexico*, 462 U.S. 554, 567-68 (1983)) (emphasis added).

Maryland's argument that Virginia must have its permission in order to use the Potomac River is defeated by the plain language of Article Seventh of the Compact of 1785 and Article Fourth of the Award. Article Seventh guaranteed equally to the "citizens of each state respectively . . . full property in the shores of Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river. . . ." (S.M. App. B-3.) The right of fishing was likewise to be "common to, and equally enjoyed by, the citizens of both states. . . ." (*Id.*) This language is plain and unambiguous and is not qualified by any authority on the part of either State to require permits as a condition of access by the citizens of the other State.

Maryland argues that Article Seventh was only a one-way grant of riparian rights by Maryland to Virginia citizens,

thereby silently reserving Maryland's implied right to regulate the terms of their access. Although Maryland's assumption that its ownership of the River was "well-settled" in 1785 is demonstrably wrong, *see infra* at 19-21, there is also nothing in the text of Article Seventh to support Maryland's argument. Unlike Article First of the Compact, by which *Virginia* forever disclaimed the right to impose tolls on Maryland vessels passing between the Capes of Chesapeake Bay – where Virginia's title was clear (S.M. App. B-1 to B-2) – Article Seventh recognized "common" rights and mutual grants in the Potomac River – where the boundary was unsettled. While Article Seventh left each State free to control its *own* citizens' activities on its own shore, it gave neither State the power to control the construction of improvements or the withdrawal of water by citizens of the *other* State. Indeed, the Compact carefully addressed situations where one State's regulatory authority would touch the other State's citizens. Article Fourth provided for certain vessels to "enter and trade in any part of either state, with *a permit* from the naval-officer of the district from which such vessel departs with her cargo. . . ." (*Id.* B-2 (emphasis added).) Article Eighth required legislation to be approved by *both* Virginia and Maryland before either State could regulate fishing or navigation in the River. (*Id.* B-3.) Article Tenth provided that offenses committed on the River would be prosecuted by the State in which the offender was a citizen, or by the State in which the victim was a citizen if the offender were a citizen of neither. (*Id.* B-4 to B-5.) Article Eleventh provided for process of either State to be served anywhere on the River, but *not* on citizens of the other State. (*Id.* at B-6 to B-7.) Had the drafters intended in Article Seventh for Maryland to have the authority to control the terms of Virginia's water withdrawals or its construction of wharves and other improvements, they certainly would have said so, particularly since their purpose was to "settle the jurisdiction" over the River. (S.M. App. B-1.)

Virginia's rights as a *sovereign* under Article Seventh of the Compact of 1785 were further confirmed by Article Fourth of the Black-Jenkins Award, which provided that:

> *Virginia* is entitled not only to the full dominion over the soil to low-water mark on the south shore

> of the Potomac, but has a *right* to such use of the river *beyond the line of low-water mark* as may be necessary to the full enjoyment of *her* riparian ownership, without impeding the navigation or otherwise interfering with the proper use of it by Maryland, *agreeably to the compact of seventeen hundred and eighty-five*. (*Id.* C-4 (emphasis added).)

The italicized language emphasizes that Virginia's rights as a sovereign under Article Seventh of the Compact of 1785 were recognized and protected. The arbitrators also pointed out in their opinion that Virginia had expressly reserved its right to use the River and to build improvements from the shore both in its Constitution and in the Compact of 1785, and that Maryland had "assented to this" by agreeing to Article Seventh of the Compact. (*Id.* D-18.) Article Fourth of the Award is plain and unambiguous, and free of any inference that Maryland can somehow require permits as a condition of Virginia's exercising its *right* to use the River.

Where an interstate compact is clear and unambiguous, like Article Seventh of the 1785 Compact and Article Fourth of the 1877 Award, "that language is conclusive and no evidence extrinsic to the Compact needs consideration." (Report at 15 (collecting cases).) For the sake of completeness, however, it is noteworthy that Maryland's present interpretation of the Compact is contradicted by its own "[e]arly and long-continued" practical construction. *Wheeler Lumber Bridge & Supply Co. v. United States*, 281 U.S. 572, 576 (1930). In the early years following the Compact of 1785, Maryland authorized the Commissioners of the District of Columbia to issue permits for piers in the City of Washington extending into the River from the *Maryland side*, but that authority did not encompass piers on the *Virginia side*. (Report at 70-71; L-545 to L-549.) Virginia, not Maryland, regulated the vessels, docks and wharves extending into the River in the Town of Alexandria. 1798 Va. Acts. ch. 60, § 6, 2 Va. Stat. 122, 123 (1835) (L-159). Similarly, Virginia, not Maryland, regulated the numerous ferries that crossed the Potomac River between the two States. *E.g.*, 2 Va. Code ch. 237, § 8 (1819) (L-162 to L-164; *see also* L-684 n.185).

Maryland's interpretation of the 1785 Compact at the time of the Black-Jenkins Award also confirms beyond any doubt that Maryland lacks the authority to regulate Virginia's construction of improvements extending into the Potomac River. In their 1873 report to Maryland Governor Whyte, the Maryland Commissioners, led by Isaac D. Jones, advised that the boundary should be drawn in a way that protected Virginia's existing and future improvements in the River:

> following the said river, at low water-mark, to all wharves and other improvements now extending, or which may *hereafter* be extended, *by authority of Virginia*, from the said shore into the said river beyond low water-mark, and following the said river *around* said wharves and improvements to low water-mark on the southeastern side thereof. . . .

Maryland Boundary Commissioners' Report, *supra*, at 42, 53, 140 (emphasis added) (L-22, L-27, L-70). The Maryland Commissioners explained:

> The line along the Potomac River is described in our first proposition according to *our construction* of the compact of 1785, and as we are informed, is according to the *general understanding of the citizens of both States* residing upon or owning lands bordering on the shores of that river, and also *in accordance with the actual claim and exercise of jurisdiction by the authorities of the two States hitherto.*

Id. at 27 (emphasis added) (L-14). The Maryland Commissioners believed that their position was also consistent with Virginia's Constitution of 1776, which they interpreted as reserving to Virginia "such improvements beyond that mark as *Virginia might deem proper to authorize.*" *Id.* at 125 (emphasis added) (L-62); *see also id.* at 41 ("It is admitted, that the exception from the quit-claim in the Virginia Constitution of 1776 . . . to which Maryland agreed in the compact of 1785, modified to some extent, the limits contained in the Maryland charter.") (L-21). During the arbitration proceedings the

following year, Maryland's counsel (at that point former Governor Whyte and former commissioner Jones) invoked the same boundary description – going around any improvements to be constructed *"by authority of Virginia"* – as *"what the State of Maryland considers that 'true line'* to be. . . ." (L-130 (emphasis added).)

Maryland thus acknowledged that Virginia enjoyed complete authority to decide when and whether to extend any improvements into the Potomac River – "by authority of Virginia." (*Id.*) Maryland's view was based on its *own* construction of the Compact of 1785 and the Virginia Constitution of 1776, on the "general understanding of the citizens of both States," and on "the actual claim and exercise of jurisdiction by the authorities of the two States hitherto." (L-14.) As the Special Master recognized, Maryland's position in 1873 is "simply impossible to harmonize with the notion that nearly a century before all parties would have understood that Maryland had the power to regulate the Compact rights of both Marylanders and Virginians." (Report at 52.)

Maryland argues, nonetheless, that "boundary means sovereignty," so that the arbitrators – by fixing the boundary on the Virginia side at low-water mark – implicitly gave Maryland the authority to regulate Virginia's construction of improvements extending beyond the boundary line. (Md. Exc. at 23.) But Maryland ignores the text of Article Fourth of the same Award that set the line, which explicitly gave Virginia the *right* to use the River *beyond the line of low-water mark* without requiring Maryland's prior permission. Maryland also ignores that each State had agreed in 1874, as a condition of submitting the boundary dispute to arbitration, that

> *neither of the States*, nor the citizens thereof, shall, by the decision of the said arbitrators, be deprived of any of the rights and privileges enumerated and set forth in [the Compact of 1785], but that the same shall remain to and be enjoyed by the said *States* and the citizens thereof, forever.

1874 Md. Laws ch. 247 § 1 (emphasis added) (L-171); 1874 Va. Acts ch. 135 § 1 (similar language) (L-169). The arbitrators

understood that the Compact was regarded "as of such sacred obligation that all power to touch it is withheld from us. . . ." (S.M. App. D-13.) Because the 1874 legislation specifically reserved each State's prior rights and authority, Virginia's rights of access remained the same as they were prior to the Award, "agreeably to the compact of [1785]." (*Id.* C-5.) As we have seen, Maryland acknowledged prior to the Award that Virginia enjoyed the right to decide for herself when and whether to build improvements in the River. The Black-Jenkins Award did not change that.

Maryland's early construction of Virginia's rights is further confirmed not only by the fact that Maryland sought no authority to regulate West Virginia's Potomac River rights in *Maryland v. West Virginia*, 217 U.S. 577, 580-81 (1910) (*see* Report at 65-66); but also by the fact that Maryland did not apply its permitting system to any Virginian until 1957, at the earliest. (Tr. (4/24/02) at 33.) The 172 years following the Compact of 1785 – during which Maryland never asserted the right to regulate Virginia's access – is much more probative of the meaning of the Compact and the Award than Maryland's comparatively recent efforts to require Virginians to obtain permits as a condition of using the River. *See BankAmerica Corp. v. United States*, 462 U.S. 122, 130-32 (1983) (rejecting an interpretation adopted 60 years after the Clayton Act in favor of the Government's earlier construction); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (rejecting interpretation adopted 24 years later as "neither contemporaneous . . . nor consistent").

B. Maryland Incorrectly Claims that Its Ownership of the Potomac River Was "Well-Settled" in 1785.

Maryland's argument that it silently retained the authority to regulate Virginia's Potomac River access also depends on a crucial historical premise – that Maryland's sovereign authority over the Potomac River was "well-settled" at the time it formed the Compact of 1785 with Virginia. (Md. Exc. at 19.) Maryland bases that premise on decisions rendered in *1899* and later, which found that the 1632 Charter to Lord Baltimore included the entire Potomac River and took precedence over the later patents for the Northern Neck.

See Morris v. United States, 174 U.S. 196, 224-25 (1899); *Maryland v. West Virginia*, 217 U.S. 1, 45-46 (1910); *Marine Ry. & Coal Co. v. United States*, 257 U.S. 47, 63 (1921).

It is elementary that Maryland cannot rely on decisions rendered more than a century after the Compact of 1785 in order to prove that Maryland's territorial boundaries were "well-settled" in 1785. *See Vermont v. New Hampshire*, 289 U.S. 593, 604 (1933) ("Obviously the meaning of the words of the order could not be established by a rule of law declared long after its promulgation. . . ."). Maryland compounds that mistake by ignoring the Court's acknowledgment in *Morris* and *Marine Railway* that the boundary in the Potomac River *remained contested* for many years, until it was finally settled by the Black-Jenkins Award. *Morris*, 174 U.S. at 224 (stating that the controversy was "still continuing" prior to 1877); *Marine Ry.*, 257 U.S. at 63-64 (stating that the Compact of 1785 "left the question of boundary open to long continued disputes").

Black and Jenkins had ample basis when they observed in 1877 that the "State of Virginia, through her Commissioners and other public authorities, adhered *for many years* to her claim for a boundary on the left bank of the Potomac." (S.M. App. D-7 (emphasis added).) Maryland glosses over that history entirely. *See supra* at 2-7. Indeed, Maryland's contrary historical account here completely contradicts what its own highest court said in 1946, and what its own Attorney General told this Court in 1894. *See Barnes v. Maryland*, 47 A.2d 50, 52-53 (Md. 1946) ("Virginia did not yield up her claim to the rest of the river until the boundary settlement in 1877. . . . It was not until 1877, therefore, that the Potomac River boundary between the two states was finally settled."); Appellant's Brief at 23-24, *Wharton v. Wise*, 153 U.S. 155 (1894) ("[T]he boundary between the two States was unsettled and in dispute [in 1785], and the claims of the State [sic] were widely divergent.") (VX 264/PVX 61).

In short, Maryland's assumption that the boundary was somehow "well-settled" in 1785 — which serves as the "underlying premise of Maryland's argument" (Report at 47)

– is simply wrong. Had Maryland's ownership been undisputed, there would have been no need to "settle the jurisdiction" of the Potomac River in the Compact of 1785 (S.M. App. B-1), and no need to fix the boundary nearly a century later.

C. Maryland Law Cannot Determine Virginia's Rights in the Potomac River.

Maryland's third premise – that ownership of the River would entitle Maryland to apply its own laws to control Virginia's rights – fails, independently, for two separate reasons.

1. Federal Common Law, Not Maryland Law, Would Govern Virginia's Rights in the Absence of a Compact.

Even if there were no interstate compact confirming Virginia's right to use the Potomac River, and even if Maryland's ownership of the Potomac River to the Virginia shore had never been in doubt, Maryland would still not be entitled to apply its own laws to control Virginia's rights of access. Federal common law, not state law, applies "[w]hen we deal with air and water in their ambient or interstate aspects. . . ." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972); *see Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981); *Vermont v. New York*, 417 U.S. 270, 277 (1974); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). Disputes of this sort between States are governed by a "cardinal rule" – "that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none." *Kansas v. Colorado*, 206 U.S. 46, 97 (1907); *see also Texas v. New Mexico*, 462 U.S. 554, 569 n.15 (1983) ("[O]ne answer is clear: no one State can control the power to feed or to starve, possessed by a river flowing through several States.") (*quoting* Frankfurter & Landis, *The Compact Clause of the Constitution - A Study in Interstate Adjustments*, 34 Yale L. J. 685, 701 (1925)); *New Jersey v. New York*, 283 U.S. 336, 342-43 (1931) ("Both states have real and substantial interests in the

River that must be reconciled as best they may be."); *Wyoming v. Colorado*, 259 U.S. 419, 466 (1922) ("The river throughout its course in both States is but a single stream wherein each State has an interest which should be respected by the other."). Even where a river flows *entirely* through one State, mere ownership of the riverbed does not entitle that State to divert the river for its own use without regard to the interests of downstream States. *E.g., New Jersey v. New York*, 283 U.S. at 342; *Colorado v. New Mexico*, 467 U.S. 310, 317-23 (1984); *Colorado v. New Mexico*, 459 U.S. 176, 181 n.8 (1982); *Hinderlider*, 304 U.S. at 102-03; *Wyoming v. Colorado*, 259 U.S. at 466. "[A] State may not preserve solely for its own inhabitants natural resources located within its borders." *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983); *cf. Sporhase v. Nebraska*, 458 U.S. 941, 955 (1982) (recognizing Nebraska's interest in regulating its own citizens' groundwater withdrawals).

Federal common law preempts all state law, whether statutory or judge-made. *International Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987); *Hinderlider*, 304 U.S. at 110 ("[N]either the statutes nor the decisions of either State can be conclusive."). Accordingly, Maryland's legal assumption is fundamentally wrong. Maryland would not be free to apply its own permitting laws to control Virginia's use of the Potomac River even assuming: (i) the absence of an interstate compact specifically protecting Virginia's rights of access; and (ii) the fiction that the boundary has always been "well-settled." As the Court of Appeals for the Seventh Circuit put it, "[e]ach of these states has an interest in the use of the river, but the laws of one state cannot control the use of the river by citizens of other states." *Illinois v. Milwaukee*, 731 F.2d 403, 408 (7th Cir. 1984) (citation omitted).

2. The "Unmistakability Doctrine" is Inapplicable.

Maryland also fundamentally misapplies the "unmistakability doctrine," a canon of contract construction that "sovereign power . . . will remain intact unless surrendered in unmistakable terms." *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986). The Court thoroughly discussed this doctrine in *United States*

v. Winstar Corp. *See* 518 U.S. 839, 871-87 (1996) (plurality opinion by Souter, J.); *id.* at 910-18 (Breyer, J., concurring); *id.* at 920-22 (Scalia, J., concurring); *id.* at 924-31 (Rehnquist, C.J., dissenting). The canon originates from the "theory of parliamentary sovereignty, made familiar by Blackstone," that one legislature may not impair the legislative authority of a succeeding legislature because the two are of equal dignity. *Id.* at 872; *see, e.g., Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 459 (1892) ("[T]he latter have the same power of repeal and modification which the former has of enactment. . . ."). But on "this side of the Atlantic," a subsequent legislature may not undo the work of a predecessor if that would violate the Constitution. *Winstar*, 518 U.S. at 873. The unmistakability doctrine was originally developed in cases decided under the Contract Clause involving private parties' contracts with state or local governments. *Id.* at 875. Later decisions extended the doctrine "from its Contract Clause origins dealing with state grants and contracts to those of other governmental sovereigns, including the United States." *Id.* (*citing Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)).

The doctrine is "simply a rule of presumed (or implied-in-fact) intent." *Id.* at 920 (Scalia, J., concurring). Its proper application depends on the relationship of the sovereign to the other party to the contract. *Id.* at 875. The rule makes perfect sense in the context of a private citizen contracting with a State government, or a State or tribe contracting with the federal government. A private citizen could not reasonably assume that the government intends to relinquish its future sovereign powers, nor could a State or tribe assume that the federal government intends to relinquish its dominant navigational servitude, "unless the opposite clearly appears." *Id.* at 920-21 (emphasis altered).

But this is *not* a case between a State and one of its citizens, *e.g., Illinois Central R.R. Co.*, 146 U.S. at 459, or between the federal government and a *lesser* sovereign, *e.g., United States v. Cherokee Nation of Okla.*, 480 U.S. 700, 707 (1987); *Montana v. United States*, 450 U.S. 544, 552-53 (1981). Virginia and Maryland were *co-equal* sovereigns when they entered into the

Compact of 1785, at a time when their boundary was disputed. They specifically preserved their Compact rights, as a condition of submitting the boundary dispute to arbitration, without knowing where the boundary would be fixed. The premise of the unmistakability doctrine – that one party is junior to a superior sovereign – simply does not apply here. The Special Master explained it this way:

> Here, where an arbitration between equal sovereign States at last decides the location of a boundary and simultaneously confirms pre-existing rights in one of those States, *it would be anomalous to conclude that the rights of that sovereign State and its citizens are subject to regulation by the other co-equal sovereign without the slightest suggestion of that fact.* (Report at 57 (emphasis added).)

Understanding the history of the States' previous boundary dispute is critical. *See Ohio v. Kentucky*, 444 U.S. 335, 337 (1980) (discussing the importance of "historical factors" in fixing the boundary at the low-water mark on the northerly side of the Ohio River as it existed in 1792). Focusing on what the States knew at the time of the Compact of 1785, the Special Master correctly concluded that "[a]ny notion that Maryland had . . . an overriding 'police power' to impose further regulation upon the express rights vested in Virginia under Article Seventh would certainly have been abhorrent to the Virginia Commissioners and legislators and at least foreign to the Maryland Commissioners and legislators." (Report at 46.)

In this respect, the Compact of 1785 was not at all like the 1786 Treaty of Hartford, in which Massachusetts agreed that New York would forever enjoy exclusive "rights as a sovereign state in the granted territory. . . ." *Massachusetts v. New York*, 271 U.S. 65, 87 (1926). Those rights necessarily included ownership of submerged lands in the navigable waters of Lake Ontario. *Id.* at 88-90. The Compact of 1785 was also different from the Compact of 1834 between New Jersey and New York, which settled the "territorial limits" of the two states. *Central R.R. Co. of New Jersey v. Mayor of New Jersey*, 209 U.S. 473, 477 (1908). The Court found it "plain on the face of the agreement"

that New Jersey retained sovereignty to impose taxes on lands located on its side of the boundary. *Id.* at 478-79. Unlike the parties to those compacts, the parties to the Compact of 1785 knew that the boundary was disputed and that they were not resolving that controversy. To the extent they negotiated the Compact "with reference to principles of law existing at the time the contract was made," *Kansas v. Colorado*, 533 U.S. 1, 20 (2001) (O'Connor, J., concurring in part and dissenting in part), they would have understood that *neither* State could unilaterally impose its own laws on the other. *See* T. Rutherforth, *Institutes of Natural Law*, Book II, Ch. 9, § 7, at 491 (1754, 2d Amer. ed. 1832) ("Where a question arises between two nations about the extent of their respective territories; that is, about their respective right to this or that tract of land; *the civil law of either nation cannot be the proper measure*, by which the controversy is to be determined. . . .") (emphasis added).[7]

Furthermore, notwithstanding the premise of the unmistakability doctrine – that a subsequent legislature has the same authority to repeal laws as its predecessor had to enact them – a State cannot undo the work of a prior legislature if to do so would violate the Constitution. *Winstar*, 518 U.S. at 873; *Mugler v. Kansas*, 123 U.S. 623, 663 (1887); *New Orleans Gas-Light Co. v. Louisiana Light & Heat Prod. & Mfg. Co*, 115 U.S. 650, 661 (1885). The Compact Clause, Art. I, § 10, cl. 3, clearly prevents a party to an interstate compact from later backing out of the deal. Indeed, "since the Constitution provided the compact for adjusting interstate relations, compacts may be enforced *despite* otherwise valid state restrictions on state action." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 34 (1951) (Reed, J., concurring) (emphasis added); *United States v. Bekins*, 304 U.S. 27, 52 (1938) ("The States with the consent of Congress may enter into compacts with each other and the provisions of such compacts may limit the agreeing States in the exercise of their respective powers."); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 88-89 (1823) ("Can the

7. Rutherforth's treatise was well known to the founding generation, including Samuel Chase (one of Maryland's commissioners to the Mount Vernon Conference). *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 230-31 (1796) (Chase, J.).

government of Kentucky fly from this agreement . . . because it involves a principle which might be inconvenient, or even pernicious to the State, in some other respect? The court cannot perceive how this proposition could be maintained.").

That a compact may be deemed "in derogation of the sovereignty of the state" is completely irrelevant if the "agreement, properly construed, so provides. The fundamental question is, What does the contract mean?" *Virginia v. West Virginia*, 238 U.S. 202, 234 (1915). The Special Master correctly answered that question: Article Seventh of the Compact and Article Fourth of the Award gave Virginia the right to use the Potomac River without having to obtain Maryland's permission. (Report at 45-46, 57.)

D. Maryland's Claimed Regulatory Authority Cannot be Reconciled with Virginia's Rights of Access.

Maryland's handling of the FCWA's offshore intake project demonstrates that its assertion of regulatory authority would render meaningless Virginia's *right* to use the River. Even after the Maryland ALJ ruled that the construction and operation of the project would have no adverse environmental impact (VX 325/PVX 242 at 7-10), Maryland continued its refusal to approve the project, asserting that it had the right to determine whether the FCWA "needed" an offshore intake (VX 312/PVX 243 at 13, 19). Maryland gave no deference whatsoever to the FCWA's own judgment, or to the finding by the Virginia Department of Health that the project was an "essential public health initiative" for more than a million people in Northern Virginia. (L-379.) While the FCWA ultimately proved the "need" for the project to the satisfaction of the Maryland ALJ (VX 197/PVX 248 at, *e.g.*, 45), to MDE's "Final Decision Maker" (VX 318/PVX 253 at 7-13, 17-18), and to a Maryland state judge (VX 267/PVX 257 at 17-21), its victory came only after four years of litigation, hundreds of thousands of dollars in litigation costs, and millions of dollars in annual water treatment costs unnecessarily wasted while Maryland obstructed Virginia's rights of access to the River. (L-331.)

In the meantime, Maryland's Governor took credit for blocking the project (L-384), complaining that it would contribute to urban "sprawl" in Virginia (L-360). The Maryland General Assembly also joined the fray, requiring a flow-restrictor for the express purpose of controlling Virginia's development. (L-355 to L-356, L-360 to L-361.) Maryland's attempt to determine what was purportedly in Virginia's best interest created both "the appearance" and the "reality, of partiality to one's own." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971).

Maryland continued its regulatory overreach in 2002, when it asserted the authority to make Virginia *pay* for water withdrawn from the Potomac River. Maryland's Governor introduced legislation allowing MDE to require all permitees to pay for their water withdrawals. (VX 125/PVX 330; VX 126/PVX 331.) Maryland's Secretary of the Environment defended the decision to apply the legislation to Virginia on the ground that Maryland would impose such fees equally on Virginia and Maryland users. (VX 278/PVX 334.) After the Virginia Attorney General protested the plan as a clear violation of Virginia's compact rights (VX 204/PVX 332), and after media reports questioned whether this new legislation would undermine Maryland's case here (VX 225/PVX 333), the Governor's proposal was not reported out of committee (VX 127/PVX 335).

Maryland's legislative efforts, and the FCWA's own recent experience, are a barometer of things to come. Virginia's *right* of access to the Potomac River is rendered meaningless if Maryland can decide for itself whether Virginia "needs" such access, if Maryland can use its putative control over the River to restrict Virginia's development, or if Maryland can make Virginia pay for the privilege of using the River when the Court is no longer watching.

II. THE SPECIAL MASTER CORRECTLY REJECTED MARYLAND'S AFFIRMATIVE DEFENSE OF PRESCRIPTION AND ACQUIESCENCE.

A. A State Cannot Lose a Compact Right by Prescription and Acquiescence.

The Special Master properly questioned whether "the doctrine of acquiescence could apply to the unique situation presented here. . . ." (Report at 81.) The Court has never held that a State can lose a federally-approved interstate compact right by acquiescing in another State's prescriptive acts. Indeed, the Court permitted Texas to recover for New Mexico's breach of the Pecos River Compact during an earlier, 33-year period (1950-1983), stating: "There is nothing in the nature of compacts generally or of this Compact in particular that counsels against rectifying a failure to perform in the past as well as ordering future performance called for by the Compact." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). The same is true here.

When Congress approved the Black-Jenkins Award and, thereby, the original Compact of 1785, *Wharton*, 153 U.S. at 173, Virginia's compact rights were transformed into federal law binding on the signatory states under the Supremacy Clause. *E.g., New Jersey v. New York*, 523 U.S. 767, 810-11 (1998); *Texas v. New Mexico*, 462 U.S. 554, 564 (1983); *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). Just as no State can alter a federal law, no State can alter a federally-approved compact. As the Court put it in *New Jersey v. New York*, "'unless the compact to which Congress has consented is somehow unconstitutional,' no court may order relief inconsistent with its express terms, no matter what the equities of the circumstances might otherwise invite." 523 U.S. at 811 (*quoting Texas v. New Mexico*, 462 U.S. at 564). Because prescription is merely an equitable doctrine, *Ohio v. Kentucky*, 410 U.S. 641, 648 (1973), it cannot be invoked by Maryland to deprive Virginia of its federally-approved compact rights.

B. Even if Applicable, the Doctrine Should Require Proof by Clear and Convincing Evidence.

Assuming that one State can be deprived of a federally-approved compact right by another State's prescriptive acts, the extraordinary nature of such a dispossession should require extraordinary proof: clear and convincing evidence. The Court in *New Jersey v. New York* emphasized how heavy the burden should be in the traditional context of a boundary dispute: "It is essential to appreciate the extent of this burden that a claimant by prescription must shoulder." 523 U.S. at 787 (Opinion by Souter, J.). Justice Breyer called it a "high barrier," *id.* at 814 (Breyer, J., concurring), and Justice Scalia a "very high burden of proof," *id.* at 829 (Scalia, J., dissenting). A "clear and convincing" standard best reflects these sentiments, particularly when the defense is invoked to defeat an interstate compact right that Maryland repeatedly promised would last forever. (S.M. App. B-7 to B-8; L-180.)

Virginia acknowledges this Court's reference to the "preponderance" standard in *Illinois v. Kentucky*, 500 U.S. 380, 384 (1991). However, the Special Master in that case cited no legal authority for the lower standard, Report of Special Master at 11-12, *Illinois v. Kentucky*, No. 106, Orig. (July 5, 1990), neither of the parties questioned it, and the point was moot because Kentucky failed to carry its burden anyway. Similarly, the Court in *New Jersey v. New York* cited the "preponderance" language from *Illinois*, *see* 523 U.S. at 787, but the issue was again moot because New York also failed to carry its burden. *Id.* at 790. The Special Master here likewise did not reach that question because the evidence did not "come close to making the necessary showing." (Report at 81.)

While federal law governs this question, the Court should consider that state common law, including the law in both Virginia and Maryland, requires a party to prove by "clear and unequivocal" evidence that an easement has been lost through prescription and abandonment. *See Pizzarelle v. Dempsey*, 526 S.E.2d 260, 264 (Va. 2000); *Shuggars v. Brake*, 234 A.2d 752, 758 (Md. 1967); 23 Am. Jur. 2d *Easements and Licenses* § 112 (1996). It would be anomalous to require a lesser standard

to establish a sovereign's loss of an interstate compact right than to prove a citizen's loss of a mere private easement.

C. Maryland's Evidence is Inadequate Even Under a "Preponderance of the Evidence" Standard.

1. The Only Relevant Evidence Concerns Water Withdrawal and Waterway Construction.

Most of Maryland's evidence has nothing whatsoever to do with Virginia's right to withdraw water from the Potomac River or to build improvements appurtenant to the Virginia shore. The Special Master correctly found that evidence that Maryland has regulated entirely *different* activities on its side of the boundary – such as liquor sales, lotteries and gambling – fails to demonstrate in any way that Virginia has lost the two specific rights at issue here. (*See* Report at 78-81.) Similarly, none of the Virginia Attorney General Opinions cited by Maryland (Md. Exc. at 38) speaks to whether Maryland can control Virginia's rights to withdraw water and build improvements. The one most nearly on point reaffirmed the rights of Virginians to construct improvements from the shore. 1948-49 Va. Att'y Gen. Rep. 118 (Md. App. 30).

2. Virginia Taxes More Than 99% of the Structures Extending Beyond the Boundary.

Maryland cites taxation as "one of the primary indicia of sovereignty" (Md. Exc. at 34-35 (quoting *Illinois v. Kentucky*, 500 U.S. 380, 385 (1991)), supporting its regulation of Virginia's access to the River. However, there are at least 338 structures extending from the Virginia shore beyond the boundary line (including piers, docks and boat ramps) that are taxed *exclusively* by Virginia localities, *not* Maryland. (*See* VX 283/PVX 132, ¶¶ 2-3 (25 in Stafford County); VX 276/PVX 127, ¶¶ 2-3 (204 in Westmoreland County); VX 287/PVX 135, ¶¶ 2-3 (59 in Northumberland County); VX 282/PVX 131, ¶¶ 2-3 (50 in King George County).)

By contrast, Maryland imposes real estate taxes on only *three* establishments reached by piers from the Virginia shore: "Jamaica Joe's" (MX 601/PMX F, ¶ 8; MX 836/PMX G, ¶ 4);

"Flanagan's" (MX 601/PMX F, ¶ 15); and "Coles Point" (MX 1041/PMX H, ¶ 3). Westmoreland County, Virginia, taxes the piers leading to Flanagan's and Coles Point, but not the restaurants. (VX 276/PVX 127, ¶ 4.) King George County, Virginia, taxes neither the restaurant nor the pier at Jamaica Joe's. (VX 282/PVX 131, ¶ 3.) As Maryland points out, these establishments experienced their heyday between 1949 and 1958, when slot machines were legal in Maryland but illegal in Virginia. (MX 913/PMX W, ¶¶ 3-23; MX 617/PMX C, ¶ 8.) To protect their gambling businesses, the proprietors went to extraordinary lengths to show that their operations were *not* in Virginia. They recorded the deeds for the properties in Maryland. (MX 913/PMX W, ¶¶ 24-32 & Exs. 17-24.) At least two of the proprietors cut gaps in their piers to show that the property was not in Virginia. (MX 913/PMX W, ¶ 42 & Ex. 33; MX 949/PMX S, ¶ 3.) Another placed a large sign at the boundary line to show that the customer was entering the State of Maryland. (MX 616/PMX N, ¶ 3.)

Maryland produced no evidence that any of these restaurants was built pursuant to a Maryland waterway construction permit, so the relevance of its taxation of these structures is questionable. Nonetheless, to the extent that the States' respective taxation of shoreline improvements is relevant to Virginia's right to build such structures in the first place, the evidence thoroughly undercuts Maryland's case, just as it undercut Kentucky's prescriptive claim in *Illinois v. Kentucky*. Kentucky taxed only three of the 15 structures that extended from the Illinois shore of the Ohio River. 500 U.S. at 385. Maryland fares much worse by comparison – taxing only three out of approximately 340 structures. Maryland's claim must likewise fail.

3. Maryland Failed to Prove Virginia's Knowledge of Maryland's Permitting System Prior to 1973.

To prove its affirmative defense, Maryland must show that its prescriptive acts were *known* to the Commonwealth of Virginia and that Virginia failed to protest for a period that is sufficiently protracted to establish acquiescence. *New Jersey v. New York*, 523 U.S. at 787, 807. Officials from the Virginia State

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Water Control Board ("SWCB") certainly knew in August 1973 that Maryland was requiring the FCWA to obtain a permit to withdraw water from the Potomac River at the Virginia shoreline. The SWCB sent a letter to Maryland's Water Resources Administration supporting the issuance of the permit. (MX 897/PMX X-54.) Maryland relies on this letter, and other documents from 1973, to claim that Virginia "actively participated" in Maryland's permitting process. (Md. Exc. at 43 (*citing* Md. App. 208-10, 216).)

Maryland offered no evidence, however, to prove that Virginia state officials knew prior to 1973 that Maryland claimed that its permitting laws were binding on Virginia. Although Maryland enacted its permitting system in 1933, the legislation did not mention the Potomac River. 1933 Md. Laws ch. 526, §§ 4, 5 (VX 69/PVX 318). Maryland did not enact a specific statute requiring permits for waterway construction in the Potomac River until 1957. 1957 Md. Laws ch. 757 (VX 74/PVX 321). Even then, neither the original 1933 legislation nor the 1957 statute applied to Virginia, its municipalities or citizens. These laws required a permit to be obtained only by "*the State* [of Maryland] or any agency thereof, any person or persons, partnership, association, private or public corporation, county, municipality, or other political subdivision *of the State*. . . ." Md. Code Ann., Art. 66C, §§ 720-722 (Michie 1957) (emphasis added) (L-184 to L-186). It was not until 1973 that these statutes dropped the bracketing term "the State" and broadened their reach to any "person" seeking to withdraw water or to engage in waterway construction. *See* 1973 Md. Laws ch. 4, §§ 8-802(A), 8-803(A), 8-804 (VX 87/PVX 323). The amendment itself did not give Virginia even constructive notice that Maryland's permitting laws now applied to Virginia users. A State is generally not required to "scrutinize the discourse of those in [another State] even if in statutory form." *Marine Ry.*, 257 U.S. at 65.

As of 1973, moreover, two northern Virginia localities had been using Potomac River water for decades without a permit from Maryland. Arlington County, since 1927, and the City of Falls Church, since 1947, have received their water from the

Washington Aqueduct Division of the Army Corps of Engineers (the "Aqueduct"). *See generally* Harry C. Ways, *The Washington Aqueduct, 1852-1992*, at 105, 129-30 (1992) (VX 259/PVX 281). (*See also* L-478). The Aqueduct, which also supplies water to the District of Columbia, has withdrawn its raw water at the Maryland shore of the Potomac River since 1859. Ways, *supra*, at 29. Maryland concedes that it has *never* required a permit for any of the Aqueduct's withdrawals, including water supplied to these two Virginia localities. (L-423 to L-424; L-553.)

Moreover, when the States were last before this Court in 1957, after Maryland had attempted to abrogate the Compact of 1785, Maryland never asserted that it could regulate Virginia's right to withdraw water or to build improvements appurtenant to the Virginia shore. Even though the 1957 controversy did not involve these rights, Article VII, Section 1 of the new compact specifically preserved them:

> The rights, including the privilege of erecting and maintaining wharves and other improvements, of the citizens of each State along the shores of the Potomac River adjoining their lands shall be neither diminished, restricted, enlarged, increased nor otherwise altered by this Compact. . . . (S.M. App. E-23-24.)

The Commissioners' joint report explained that Article Seventh of the Compact of 1785 was "reflected" in this provision, which "carries forward certain rights of the citizens of Maryland and Virginia which have *not been in controversy*." (*Id.* E-8 (emphasis added).)[8]

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8. Maryland misplaces its reliance on the Preamble to the 1958 Compact, which stated that Maryland is "the owner of the Potomac River bed and waters" to the low-water mark on the Virginia shore, while Virginia owns the "bed and waters southerly from said low water mark. . . ." (S.M. App. E-10.) That was simply an abbreviated description of the 1877 boundary determination, not a hidden message that the parties had agreed that Maryland was now entitled to regulate Virginia's water withdrawals or waterway construction. Maryland's interpretation would contradict both the Commissioners' report and the savings provision in Article VII, § 1.

It turns out that Maryland issued its first water appropriation permit to a Virginia locality – Fairfax County – in March 1957 (MX 850/PMX X-7), but there is no evidence that Virginia state officials knew about it. The permit was allowed to lapse in 1964 when no construction plans had materialized. (L-614.) In 1968, Maryland issued a water appropriation permit to the Town of Leesburg, Virginia. (MX 860/PMX X-17.) It is unclear in retrospect why Fairfax County or Leesburg applied for a permit. Even if the Maryland law had applied to Virginia users at the time, it required no permit for "the use of water for an approved water supply of any municipality. . . ." Md. Code Ann., Art. 66C, § 720 (Michie 1957) (L-184).

Maryland failed to prove that Virginia state officials knew about either the 1957 or the 1968 permit.[9] It does not follow from the fact that a Virginia locality received a permit from Maryland that Virginia, as a sovereign state, acquiesced at the time in Maryland's permitting authority. "[A]cquiescence presupposes knowledge. . . ." *New Jersey v. New York*, 523 U.S. at 787. As a sovereign state, Virginia was no more on notice that Maryland had issued a permit to Fairfax County than New Jersey was on notice that New York had been recording vital statistics about the persons residing on the filled portion of Ellis Island, or that New York and New York City had been registering those "New Jersey" citizens to vote. *Id.* at 795-98. Virginia could not be expected to have protested Maryland's application of its permitting system to Virginia until such time as its responsible *state* officials became aware of that fact.

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9. The closest Maryland came was a *draft* letter dated February 1968 from Governor Spiro T. Agnew to Virginia Governor Mills E. Godwin, Jr. (MX 891/PMX X-48.) The draft referenced an alleged inquiry by Governor Godwin about the status of a permit for the Town of Leesburg. Maryland offered no evidence of the substance of Governor Godwin's inquiry, if any, or what he may have been told. The draft of a letter that was never sent fails to show that Virginia officials knew and approved of Maryland's assertion of regulatory authority in contravention of Virginia's Potomac River rights. Even assuming for the sake of argument that Virginia state officials knew about the 1968 permit, Virginia clearly protested Maryland's claimed authority eight years later. *See* Part II(C)(4), *infra*, at 36-43.

Nor could Fairfax County or the Town of Leesburg be deemed agents of Virginia for the purpose of giving up Virginia's compact rights or of acquiescing in Maryland's permitting authority. Under Virginia's "Dillon Rule," localities may exercise only those powers that are expressly granted by the General Assembly, and such powers as are necessarily implied from the express delegation. *E.g., Board of Supervisors v. Countryside Investment Co.*, 522 S.E.2d 610, 613 (Va. 1999); *County Bd. v. Brown*, 329 S.E.2d 468, 470-72 (Va. 1985). No Virginia locality has the power to relinquish an interstate compact right belonging to the Commonwealth. To the contrary, Virginia law is "well settled . . . that the power to amend and repeal statutes is vested exclusively in the legislature." 1978-79 Va. Att'y Gen. Rep. 110, 112 (VX 335/PVX 312); *see* Va. Const. Art. I, § 7 (Michie 2001) ("[A]ll power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.").

Federal common law would likewise not permit the actions of a locality or of a State's citizens to alter or restrict the State's interstate compact rights. *See New Jersey v. New York*, 345 U.S. 369, 373 (1953) (ruling that the City of Philadelphia could not take a different position from Pennsylvania respecting the latter's interest in the Delaware River); *Kentucky v. Indiana*, 281 U.S. 163, 173-74 (1930) (refusing to permit Indiana citizens to question Indiana's bridge contract with Kentucky). "[O]fficers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." *United States v. California*, 332 U.S. 19, 40 (1947); *see also California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 276 n.4 (1982) ("California does not contend that, having applied for a state permit, the United States is estopped from asserting its claim to ownership of the disputed land. Such an argument is foreclosed by *United States v. California*. . . ."); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("As a general rule, laches or neglect of duty on the part of officers of the government is no defense to

a suit by it to enforce a public right or protect a public interest.").

In short, the prescriptive period asserted by Maryland did not begin to run until 1973, at the earliest, when Virginia state officials first knew that Maryland was requiring the FCWA to obtain a permit to withdraw water from the Virginia shore of the Potomac River.

4. Any Prescriptive Period Was Interrupted in 1976, When Virginia Protested Maryland's Claim.

Beginning in 1976, Virginia clearly protested Maryland's claimed authority to regulate Virginia's rights of access to the Potomac River, and Maryland clearly understood that its own authority was in dispute. This occurred during the States' negotiations concerning the federal legislation that ultimately became Section 181 of the Water Resources Development Act of 1976. Pub. L. No. 94-587, 90 Stat. 2917, 2939-40 (Oct. 22, 1976), *codified at* 42 U.S.C. § 1962d-11a. That legislation provided for the Secretary of the Army, the Commonwealth of Virginia and the State of Maryland to enter into an agreement apportioning the waters in the Potomac River during times of low flow. Virginia provided the Special Master with a comprehensive history of that legislation, the resulting Potomac River Low Flow Allocation Agreement of 1978 ("LFAA"), and the current water supply system for the Washington Metropolitan area. (*See* L-483 to L-501.)

Virginia's "non-acquiescence" was made clear in a number of ways, including the following:

- On July 8, 1976, Eugene Jensen, the Executive Director of the Virginia SWCB, wrote to Herbert Sachs, the Director of Maryland's Water Resources Administration: "*It should be stated for the record, that Virginia has not recognized the Maryland permit and appropriation authority* for Virginia waters nor for any waters for which Virginia has been guaranteed its full enjoyment of riparian ownerships, rights and privileges by the Compact of 1785." Letter from Jensen to Sachs of 7/8/76 at 2 (emphasis added) (L-136).

- Sachs – the official most knowledgeable about Maryland's discussions with Virginia on this subject (L-422) – testified at his deposition in this case that "throughout my tenure with the Department I had seen several indications from writers in Virginia that they questioned Maryland's authority on issuing permits." (L-427; L-430 to L-431 (acknowledging several such incidents).)
- In three separate Congressional hearings during the summer of 1976, Virginia's representatives repeatedly asserted Virginia's unqualified right to withdraw water from the Potomac River pursuant to the Compact of 1785 and the Black-Jenkins Award of 1877. *See Potomac River: Hearings & Markup Before the Subcomm. on Bicentennial Affairs, the Environment, and the International Community, and the House Comm. on the District of Columbia*, 94th Cong., 2d Sess. 680, 693-94, 703 (1976) (Statement of E. Shiflet) (June 25, 1976) (L-215, L-221 to L-222) [hereinafter "First 1976 House Committee Hearings"]; *Omnibus Water Resources Development Act of 1976: Hearings before the Subcomm. on Water Resources of the Senate Comm. on Public Works*, 94th Cong., 2d Sess. 2068-73 (1976) (Statement of J. Leo Bourassa) (Aug. 5, 1976) (L-231 to L-236) [hereinafter "1976 Senate Committee Hearings"]; *Water Resources Development Act of 1976: Hearings before the Subcomm. on Water Resources of the House Comm. on Public Works & Transportation*, 94th Cong., 2d Sess. 442-46 (Statement of Eugene Jensen) (Aug. 31, 1976) (L-241 to L-245) [hereinafter "Second 1976 House Committee Hearings"].
- On behalf of the United States Army Corps of Engineers, General Robert S. McGarry testified before Congress that the federal government disputed Maryland's asserted authority to allocate Potomac River water and that "Virginia interests among others would object to an act that said for ever and ever Maryland owned and could allocate that water." First 1976 House Committee Hearings at 22 (L-207).

- The Virginia SWCB actively opposed the initial draft of the water allocation bill, introduced by Maryland's representatives, because it did not include Virginia as a party and did not respect Virginia's authority in the Potomac River. The Virginia representatives testified that the bill "might deprive Virginia of its riparian rights to the waters of the Potomac River as guaranteed by the 1785 compact between Virginia and Maryland, and the arbitration award of 1877. . . ." 1976 Senate Committee Hearings at 2068 (L-231); Second 1976 House Hearings at 442 (same) (L-241).
- At a meeting between Virginia and Maryland officials on August 16, 1976, the Virginia representatives advised their Maryland counterparts, including Sachs, that "Virginia has vested rights to Potomac Water and *does not need to have an allocation permit from anyone to withdraw water*." Memorandum from Jones to Jensen of 8/17/76 (L-137) (emphasis added). Sachs admitted that "there were a number of instances where discussions like that occurred." (L-431; *see also* L-425 to L-428.)
- In response to Virginia's objections to the draft legislation, Maryland agreed to amend the bill not only to include Virginia as a party, but specifically to avoid any inference that water withdrawals by Virginia users were subject to Maryland's regulatory authority. In particular, the savings language was rewritten to provide that nothing in the statute would alter "any riparian rights or other authority of . . . the Commonwealth of Virginia, or any political subdivision thereof . . . relative to the appropriation of water from, or the use of, the Potomac River." Letters from Sachs & Bourassa to Gravel & Roberts of 9/7/76 (L-139, L-142). That language was incorporated into the final version of section 181(c). *See* 42 U.S.C. § 1962d-11a(c).
- Sachs confirmed in his deposition that the purpose of this change was to "leave open the question of whether

> Maryland could apply its permitting authority to Virginia. . . ." (L-438.) Sachs had previously testified before the House committee that Maryland would agree to such an amendment for the purpose of "*leaving open the question of whether Virginia entities are subject to Maryland authority.*" Second 1976 House Committee Hearings, *supra*, at 438 (emphasis added).

Virginia's actions clearly negated any inference that it was acquiescing in Maryland's view that it could regulate and control Virginia's Potomac River access rights. *E.g., New Jersey v. New York*, 523 U.S. at 777, 789 (noting that the prescriptive period ended in 1954, when New Jersey announced its plans to tax the filled portions of Ellis Island "if a private owner took over the Island"); *Oklahoma v. Texas*, 272 U.S. 21, 33, 38, 46, 47 (1926) (finding that the passage of a 1903 Texas law asserting its version of the boundary interrupted Oklahoma's prescriptive claim). International law treatises, including many of the ones cited in *New Jersey v. New York*, 523 U.S. at 786, 788, establish that protests of this sort interrupt the prescriptive period.[10] As one Eighteenth Century scholar put it: "If any one sufficiently declares by any sign that he does not wish to give up his right, even if he does not pursue it, prescription does

10. *See, e.g.*, Ian Brownlie, *Principles of Public International Law* 157 (4th ed. 1990) ("[W]hat suffices to prevent possession from bei..g peaceful and uninterrupted[?] In principle the answer is clear: any conduct indicating a lack of acquiescence. Thus protests will be sufficient."); 1 Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States* § 116, at 387 (rev. 2d ed. 1945) ("Obviously, a State may actively challenge the encroachments of a neighbor upon its soil, and by so interrupting the continuity of the adverse claim, prevent the perfecting of a transfer of sovereignty that might otherwise result."); 1 D.P. O'Connell, *International Law* 424-25 (2d ed. 1970) ("Diplomatic protest fulfils the same function in the international law of prescription as does the filing of a suit in the corresponding branch of municipal law."); 1 *Oppenheim's International Law* § 270, at 706-07 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992) ("As long as other states keep up protests and claims, the actual exercise of sovereignty is not undisturbed, nor is there the required general conviction that the present condition of things is in conformity with international order."); 1 Robert Phillimore, *Commentaries upon International Law* § 255, at 217 (Fred B. Rothman & Co. 1985) (1854) ("[T]he title of nations in the actual enjoyment and peaceable possession of their territory, *howsoever originally obtained*, cannot be at *any* time questioned or disputed . . . .").

not prevail against him. . . . Hence it is generally said that one's right is saved by protesting." Christian Wolff, *The Law of Nations Treated According to a Scientific Method* § 364 (1764), *reprinted in* 2 *Classics of International Law, Wolff*, § 364, at 187 (James Brown Scott, ed., 1934). Protest defeats prescription because it rebuts the doctrine's fundamental assumption: "the loss of the right from the presumed *intention to abandon it.*" *Id.* § 359, at 185 (emphasis added); *accord* C. Phillipson, *Wheaton's Elements of International Law* 268-69 (5th ed. 1916); T. Rutherforth, *supra*, Book I, Ch. 8, § 3, at 64; Emmerich de Vattel, *The Law of Nations* Book II, ch. 11, § 142 (1758), *reprinted in* 3 *Classics of International Law, Vattel*, at 156 (James Brown Scott ed., 1925). Virginia's repeated statements in 1976 made clear that it had no intention of abandoning its rights of access to Maryland's control.

Maryland misplaces its reliance on the July 29, 1977 letter from Virginia's Assistant Attorney General Frederick S. Fisher to Virginia's SWCB. (Md. Exc. at 48-49; L-145.) Fisher advised that Maryland infringed upon Virginia's compact rights by requiring permits from Virginia users. (L-146.) "To avoid any inference of Virginia's acquiescence," he recommended that the LFAA, which had not yet been signed, be amended to protect Virginia's rights even further. (L-147.) Fisher cautioned, however, that such an amendment, "unless supported by other direct Virginia actions, will not be sufficient to prevent Maryland's acquiring, *in time*, by prescription, authority to subject Virginia's riparian rights to the Maryland permit system." (*Id.* (emphasis added).) Fisher suggested that the SWCB consider recommending that the General Assembly enact its own permitting system to "assert Virginia's continued intent to claim its riparian rights. . . ." (*Id.*)

This letter demonstrates an intent to retain Virginia's rights, not abandon them. In fact, Virginia undertook a number of actions *after* that letter in order to protect its rights:

- On August 5, 1977, the SWCB advised Maryland that, at least until Virginia created its own permitting system for Virginians using the Potomac River, the Board was "agreeable" to Maryland's continued

operation of its permitting system for citizens on both sides of the River. Letter from Bourassa to Sachs of 8/5/77 (L-153). The letter was written on the advice of counsel specifically "to *provide evidence in a written document that Virginia is aware of its rights and intends to protect them.*" Memorandum from Fisher to SWCB of 8/4/77 at 3 (L-150) (emphasis added). The letter was designed to "authorize[] Maryland to operate a permit program on behalf of Virginia, *in effect as its agent.*" *Id.* (emphasis added). This was an affirmative assertion of Virginia's sovereignty, not an abandonment of it.

- On September 13, 1977, at a public hearing to discuss the draft of the LFAA, Thomas Schwarberg, representing the SWCB, testified: "The Commonwealth of Virginia claims riparian rights to the waters of the Potomac as guaranteed by Compact and expects those rights to be honored. *Virginia has the sole right to regulate the Potomac River riparian rights of its citizens and political subdivisions.*" T.M. Schwarberg, Virginia's Position on the Potomac River Low Flow Allocation Agreement, at 2-3 (Sept. 13, 1977) (emphasis added) (L-248 to L-249). (*See also* VX 293/PVX 258 at 74 (hearing transcript).)

- In December 1977, the Virginia representatives negotiating the LFAA obtained three additional concessions designed both to negate any inference that Maryland had the right to issue permits to Virginia users and to protect Virginia's authority to regulate its own citizens' use of the River in the future. (*See* L-498 to L-501.) Specifically:

  (1) Article 3(C) was amended to provide that nothing in the LFAA would restrict or limit any authority "the Commonwealth may have" to issue permits for Potomac River water withdrawals. (*Compare* L-303 (Art. 3(C), final version) *with* L-280 (Art. 3(C), 12/15/1977 draft).)

(2) Article 3(E) was rewritten to delete language that communities or entities withdrawing water had to do so as "as permittees of the State" of Maryland. As revised, the Article required all persons withdrawing water either to become a member party to the agreement (like the FCWA), or to be governed by "*a*" permit that includes the applicable low flow allocations. (*See* L-501 n.122 (showing comparison); *compare* L-304 (Art. 3(E), final version) *with* L-280 (Art. 3(E), 12/15/1977 draft).)

(3) Article 3(F) was added to provide, in pertinent part, that nothing in the LFAA affected any right of the parties "to grant" permits to appropriate water during periods when the Restriction or Emergency stages of the LFAA are not in effect. (L-305 (Art. 3(F), final version).) Sachs testified that the purpose of this language was to leave "open" the question of which jurisdiction had the authority to issue water appropriation permits. (L-450.)

- In 1979, Virginia enacted the "Potomac River Riparian Rights Act." 1979 Va. Acts ch. 307 (VX 99/PVX 296). (*See* L-501 to L-502.) The Act expressly reaffirmed the rights of the Commonwealth and its citizens "to the full enjoyment of their riparian ownership as provided at common law, and in § 7.1-7 of the Compact of 1785 with Maryland, and confirmed by the Black-Jenkins Determination of 1877 and Article VII, § 1 of . . . the Potomac River Compact of 1958." Va. Code Ann. § 62.1-44.114 (Michie 2001). The Act further directed the SWCB to assist any Virginian "[i]n the event non-Virginia claimants question or seek to abridge the riparian use of the waters of the Potomac River." *Id.* § 62.1-44.116.

- In October 1979, Schwarberg informed a Senate subcommittee that: "Virginia's riparian rights to the reasonable use of the Potomac River have been partially addressed by the Low Flow Allocation Agreement, and are being further pursued through

> . . . the Potomac River Riparian Rights Act." *District of Columbia Water Supply, Hearing before the Subcomm. on Gov'l Efficiency & the District of Columbia of the Senate Comm. on Gov'l Affairs*, 96th Cong., 1st Sess. 193 (Oct. 10, 1979) (Statement of Thomas M. Schwarberg) (L-259).

These acts clearly negate any inference that Virginia was abandoning her rights to Maryland.

5. The Period from 1979 Through 1997 is Inadequate.

Eighteen years elapsed between 1979 and 1997, when Maryland withheld a permit for the FCWA's offshore intake project. Since the FCWA and Virginia vigorously asserted that Maryland's treatment of the FCWA violated Virginia's compact rights (L-330 ¶ 4; L-402), Maryland must prove that Virginia had abandoned its rights of unrestricted access during the preceding 18-year period.

(a) The Period is Too Short.

Prescription requires acquiescence "over the course of a *substantial* period. . . ." *New Jersey v. New York*, 523 U.S. at 786 (emphasis added). Although the Court has declined to prescribe a minimum number of years, it observed in the Ellis Island case that a period as short as 60 years, which had been found sufficient in *Michigan v. Wisconsin*, 270 U.S. 395 (1926), was "enough to open the door to litigation. . . ." 523 U.S. at 790. Most of the Court's acquiescence cases have involved periods significantly longer, usually "approaching or exceeding 100 years." (Report at 78 & n.106.)[11] In cases finding acquiescence based on periods shorter than a century, the facts were compelling. For example, in *Indiana v. Kentucky*, 136 U.S. 479 (1890), which involved Indiana's acquiescence for more

11. *See Georgia v. South Carolina*, 497 U.S. 376, 391-93 (1990) (160 years); *California v. Nevada*, 447 U.S. 125, 126-30 (1980) (80 years); *Ohio v. Kentucky*, 410 U.S. 641, 645-52 (1973) (151 years); *Arkansas v. Tennessee*, 310 U.S. 563, 566 (1940) (114 years); *New Jersey v. Delaware*, 291 U.S. 361, 376 (1934) (150 years); *Vermont v. New Hampshire*, 289 U.S. 593, 615-20 (1933) (121 years); *Maryland v. West Virginia*, 217 U.S. 1, 41-44 (1910) (103 years); *Louisiana v. Mississippi*, 202 U.S. 1, 53-58 (1906) (90 years); *Virginia v. Tennessee*, 148 U.S. 503, 505, 524 (1893) (85 years); *Rhode Island v. Massachusetts*, 45 U.S. (4 How.) 591, 638 (1846) (125 years).

than 70 years to Kentucky's sovereignty over the Green River Island, *id.* at 509-10, the Court emphasized that the delay was so protracted that the essential facts had "long since passed beyond the memory of man" and "the very grandchildren of men then living are now hoary with age." *Id.* at 517. Here, by contrast, the official who knows the most about Maryland's dealings with Virginia in the 1970s concerning the Potomac River – Herbert Sachs – is *still* employed by Maryland and gave a deposition in this case (L-418), while Frederick Fisher, whose letter Maryland cites as evidence of acquiescence (Md. Exc. at 48-49), serves as one of Virginia's attorneys in this action.

This Court has never found a period as short as 40 years, much less 18 years, sufficient to establish prescription and acquiescence as between sovereign States.[12] The shortest such period in an interstate suit – 41 years – came in *Nebraska v. Wyoming*, 507 U.S. 584 (1993). Wyoming was foreclosed from challenging Nebraska's diversion from the North Platte River for the Inland Lakes project because the issue had been adjudicated in the Court's 1945 decree, partly at Wyoming's request, and Wyoming did not question that ruling until 1986. *Id.* at 587, 594-95. The Special Master correctly found that the facts of that case bear no resemblance to this one. (Report at 94 n.143.) Moreover, Maryland's prescriptive claim "has been punctuated with numerous challenges by Virginia to Maryland's permitting authority (and some acknowledgement thereof by Maryland, as in the Water Resources Development Act of 1976 and the Low Flow Allocation Agreement and negotiations leading to them.)." (*Id.* at 94.)

12. Maryland misplaces its reliance on *United States v. Stone*, 69 U.S. 525 (1865), in which the Court found that an *Indian tribe* had acquiesced for "more than thirty years" in a federal survey of a reservation boundary. *Id.* at 537. *Stone* does not show that a period exceeding 30 years is sufficient to prove prescription *as between States*. "The sovereignty that the Indian tribes retain is of a unique and limited character," *United States v. Wheeler*, 435 U.S. 313, 323 (1978); and "[a]n Indian Reservation is not a State." *Arizona v. California*, 373 U.S. 546, 597 (1963). Nor has the Court ever imported the 20-year period typically applied to prescriptive claims by private parties. While Black and Jenkins referred to that period, they based Virginia's prescriptive rights on its use of the Potomac "from the *earliest* period of her history. . . ." (S.M. App. D-18 (emphasis added).)

(b) Virginia Took Action Promptly After Maryland Denied It Access to the River for the First Time in 1997.

Maryland concedes that it had never denied any Virginian access to the Potomac River prior to the 1997 dispute between Maryland and the FCWA. (Md. Moot. Reply at 12 (emphasis added); Md. Moot. Mot. at 8 (same).) That is an important factor that justifies requiring a longer period to prove acquiescence. Until 1997, the instances in which Maryland issued permits to Virginia users simply did not threaten Virginia's rights of access to the River to such a "serious magnitude" that it would have warranted, "by clear and convincing evidence," the "extraordinary" invocation of the Court's original jurisdiction. *New York v. New Jersey*, 256 U.S. 296, 309 (1921). Even after Virginia filed suit in February 2000, Maryland argued that Virginia's compact claims would not be ripe unless and until Maryland denied a permit to a Virginia user and that denial became final. (*See* Md. Br. Opp. LTF at 7-10, 15; Md. Moot. Mot. at 8; Md. Moot. Reply Br. at 5, 12.) Having taken that position, Maryland cannot argue that Virginia should have filed suit any sooner than it did.

If the Court were to find acquiescence on these facts, it would impose a hair-trigger for future original action filings between States. No State could afford to tolerate the slightest imposition on its authority for fear that failing to file suit immediately would constitute acquiescence and lead to the loss of valuable rights. States should not be discouraged from having "merely to tolerate" impositions on their authority "as a temporary expedient," *United States v. City & County of San Francisco*, 310 U.S. 16, 31 (1940), lest the Court undermine its "often expressed preference that, where possible, States settle their controversies by 'mutual accommodation and agreement.'" *Arizona v. California*, 373 U.S. 546, 564 (1963) (citations omitted).

(c) The Absence of Virginia Permitting Is Irrelevant.

Maryland exaggerates the significance of the fact that the Virginia Marine Resources Commission ("VMRC") does not issue permits for Virginia projects extending into the Potomac River. The VMRC lacks jurisdiction over projects extending beyond the boundary – not because Virginia is unable to regulate them – but because the VMRC's present jurisdiction over submerged lands is *statutorily* confined to "*state-owned* bottomlands. . . ." Va. Code Ann. § 28.2-101 (Michie 2001) (emphasis added). (*See also* L-334 to L-335, ¶¶ 2, 5.)

Virginia certainly has the power to regulate its citizens' water withdrawals and waterway construction activities in the Potomac River. Maryland neglects to mention that the construction of improvements appurtenant to the Virginia shore has long been subject to regulation by Virginia localities under the Virginia Uniform Statewide Building Code. Va. Code Ann. §§ 36-97 to 36-119.1 (Michie 1996 & Supp. 2002). The Building Code applies to, *inter alia*, "piers [and] wharves," *id.* § 36-97, even if they extend past the boundary line. (*See* MX 144/PMX CC-15 at 6.) Moreover, Virginia's State Water Control Law reaches all Virginia "State waters," which are defined as "all water, on the surface and under the ground, wholly or *partially within or bordering the Commonwealth* or within its jurisdiction. . . ." Va. Code Ann. § 62.1-44.3 (Michie 2001) (emphasis added). The SWCB obtained statutory authority to issue Virginia water protection permits in 1989. 1989 Va. Acts ch. 720, *codified at* Va. Code Ann. § 62.1-44.15:5 (Michie 2001). In August 2002, the SWCB issued a Guidance Document pursuant to which it will begin to issue permits to Virginians for Potomac River waterway construction and water withdrawals, once this litigation is successfully concluded. *See* 18 Va. Regs. Reg. 3601-03 (Aug. 26, 2002) (VX 128-29/PVX 341-42).

The relevant question, however, is not whether Virginia has sought to regulate its own citizens' access to the Potomac River, but whether Maryland has successfully *displaced*

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Virginia's right to have unrestricted access to the River subject to such regulation as Virginia deems appropriate for its own citizens. *See New Jersey v. New York*, 523 U.S. at 788 n.9 ("New York cannot meet its burden of proving prescription by pointing to New Jersey's failure to present evidence that it exercised dominion over the filled portions of the Island. . . ."). Nothing in the Compact of 1785 or the Black-Jenkins Award of 1877 obligated either State to implement a permitting system to regulate their respective citizens' use of the River. Maryland did not do so until well into the Twentieth Century, and it cannot point to Virginia's delay in doing so to prove that Virginia somehow abandoned a centuries-old compact right to Maryland.

(d) Maryland's 1987 Tidal Wetlands Policy and the VMRC Staff Correspondence Do Not Prove Acquiescence.

Maryland also places undue weight on the policy that the Maryland Board of Public Works adopted in 1987, and formalized in a 1994 regulation, concerning tidal wetlands along the Virginia shore of the Potomac River. (MX 813/PMX AA-11; MX 815/PMX AA-13.) That policy, although reviewed at the staff level in Virginia, was "not reviewed or approved by the [Virginia Marine Resources] Commission" and does not represent an official policy of the Commonwealth of Virginia. (L-335 ¶ 4.) Moreover, the policy *exempted* the vast majority of improvements constructed at the Virginia shoreline, including non-commercial piers, boat ramps and bulkheads. (MX 813/PMX AA-11; MX 815/PMX AA-13 at 2.) Thus, although Maryland claims to have issued between 250 and 350 "authorizations" (Md. Exc. at 13), in reality, only some 63 of these involved an actual license (VX 280/PVX 136 ¶ 5). The rest consisted of letters reflecting no action by Maryland or stating that no Maryland license was required. (*Id.* ¶¶ 3-5; Report at 91.)

Maryland also misstates the significance of letters by which the staff of the VMRC, beginning in the mid-1980s, transmitted to Maryland authorities (as well to the U.S. Army Corps of Engineers) copies of correspondence with Virginia

landowners who were seeking to build improvements extending into the River. All such letters were written by *staff* members, not by the Commissioners who exercise the VMRC's policy-making authority. (L-335 ¶ 5.) While the staff has transmitted such correspondence to Maryland authorities "as a matter of administrative comity," it does "not intend its transmittal letters to constitute any sort of recognition that Maryland has any greater legal authority than it does, and the staff is certainly not authorized to bind the Commission with respect to the recognition of any such authority." (*Id.*) *Accord County of Fairfax v. Southern Iron Works, Inc.*, 410 S.E.2d 674, 682 (Va. 1991) ("[S]taff may not make substantive determinations of legislative intent which have the effect of changing what was duly adopted by the governing body."). Indeed, not even the appointed members of the VMRC would have the authority to alter or suspend the Commonwealth's interstate compact rights, even if that had been their intention. *See* Part II(C)(3), *supra*, at 35; *see also* 1991 Va. Att'y Gen. Rep. 41, 44 (stating that the Virginia Constitution prevents the Governor from "suspending the operation of a duly adopted statute in the absence of some other statute authorizing [him] to do so.").

D. A Court of Equity Would Not Give Maryland Control Over Virginia's Potomac River Access Rights.

Prescription is an equitable doctrine. *Ohio v. Kentucky*, 410 U.S. at 648. If one assumes for the sake of argument that a State can lose a federally-approved compact right by acquiescing in another State's prescriptive acts, the ultimate question would be whether a court of equity should give Maryland the right forever to control Virginia's access to the Potomac River. Under our federal system, the answer must be "no." As Chief Justice Marshall put it, "Would the people of any one state trust those of another with a power to control the most *insignificant* operations of their State government? We know they would not." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) (emphasis added). For all the more reason, Maryland cannot be given the unprecedented power to control Northern Virginia's water supply or its access to this vital River.

III. ANS' ARGUMENTS ARE WITHOUT MERIT.

There is no need to address the arguments by the Audubon Naturalist Society ("ANS") on the merits of the case because those arguments, some of which were raised by Maryland before the Special Master (L-581 to L-586), are no longer maintained by Maryland here. *See New Jersey v. New York*, 523 U.S. at 781 n.3. ANS' jurisdictional claim requires only a brief response. This is the *fifth* time that ANS has argued that the case is not justiciable. Both Maryland and ANS raised the same arguments in opposing Virginia's motion for leave to file the Bill of Complaint. The Court nonetheless accepted jurisdiction and referred the case to the Special Master. When ANS renewed its objections, the Special Master patiently considered and twice rejected ANS' arguments, the second time "with prejudice." (S.M. App. F-3; Mem. Dec. Nos. 1, 2.) ANS then filed with this Court a Motion for Review of the Special Master's Finding of Subject Matter Jurisdiction, in which Maryland joined. After full briefing by the parties, the Court denied the motion. 531 U.S. 1140 (2001). The procedural posture of this case is remarkably similar to that in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), where the Court implicitly rejected the defendant's jurisdictional objections on prior motions and was "not at all inclined to dismiss the action at this juncture." *Id.* at 446.

Even if the Court were to permit ANS to take exception to the Special Master's ruling on mootness when Maryland does not question it, the case is obviously not moot. Maryland continues to insist that Virginians submit to its permitting authority under penalty of civil and criminal sanctions. (S.M. App. F-7.) One of the conditions in the Maryland permit issued to the FCWA requires a permanent flow-restrictor limiting water withdrawals to the maximum allowed under the FCWA's water appropriation permit. (VX 318/PVX 253 at 19-20; L-337.) Maryland imposed that limitation for the express purpose of controlling growth in Virginia. (L-355 to L-356, L-360 to L-361.)

Maryland's continued control over Virginia's water withdrawals is a significant problem for the Commonwealth.

See Colorado v. New Mexico, 459 U.S. 176, 182 n.9 (1982) (discussing Colorado's "substantial interest" in protecting its citizens' future use of the Vermejo River); *Kansas v. Colorado*, 206 US. 46, 99 (1907) (discussing the "state interest" of Kansas in protecting its citizens' use of the Arkansas River). *Twenty percent* of all Virginians who are not served by potable wells rely on the FCWA for their drinking water. (L-329 ¶ 1.) As of June 2001, the FCWA had invested more than $9 million for its share of three upstream reservoirs that store 17.2 billion gallons of water to supplement the River's natural flow for the benefit of the entire Washington Metropolitan area. (L-332 ¶ 8(b).) The FCWA's continued participation in regional cost sharing agreements is premised on its ability to withdraw water from the Potomac River as demands increase. (*Id.*) The FCWA and the Loudoun County Sanitation Authority both tendered un-rebutted affidavits stating that they will require increasingly larger quantities of water from the Potomac River in the future, and that their *current* water supply planning has been harmed by the political uncertainty associated with Maryland's control of their Potomac River access. (L-332 to L-333 ¶¶ 8(c), 9; L-327 to L-328.)

"[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Because Maryland knows it cannot meet that standard, it has not challenged the Special Master's ruling. ANS can do no better.

CONCLUSION

The Court should overrule Maryland's two exceptions, adopt the Report of the Special Master, and enter the Special Master's proposed Decree.

Respectfully submitted,

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